



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>









THE
LEGAL NEWS,

2801

EDITED

BY

JAMES KIRBY, D.C.L., LL.D.,

Advocate.

VOL. VIII.

MONTREAL:
THE GAZETTE PRINTING COMPANY
1885.

1

59.505

LIBRARY OF THE
STANFORD UNIVERSITY
LAW DEPARTMENT

TABLE OF CASES

REPORTED, NOTED, AND DIGESTED

IN VOL. VIII.

Adams v. Coleridge.....	224	Beaulieu & LeBel et al.....	362
Adamson v. Yeager.....	12	Behan v. Grand Trunk Railway Co.....	188
Alexander v. Léger.....	68	Bélanger v. Mann.....	188
Allan v. Arcand.....	189	Bélanger v. Paquet.....	188
Almonr v. La Banque Jacques Cartier....	60	Bell Telephone Company v. Minister of Agriculture.....	33
Arless & Belmont Manufacturing Co....	274	Bell Telephone Patent, <i>Re</i>	34
Atlantic etc. Co. v. Huth.....	128	Bell Telephone Co., <i>Re</i>	262
Attorney-General for Quebec & Reed...50,	58	Bernard v. Lalonde.....	215
Ayres v. Hubbard.....	224	Bernier v. Corporation de Québec.....	188
		Berthiaume v. Sicotte.....	133
Bacon v. R.R. Co.....	104	Bessette v. Howard.....	170
Baker v. Freeman.....	117	Bishop & Tahan.....	152
Baltimore & Ohio R.R. v. Allen et al....	16	Bishop v. Weber.....	209
Banbury & Cheltenham Direct Railway Co. v. Daniel.....	32	Bisphamette v. Dunn.....	134
Banque (La) de Québec v. Bergeron.....	189	Black et al. & Walker.....	67
Banque (La) d'Hochelaga v. Montreal, Portland & Boston Ry. Co.....99,	100	Blais v. Vallières.....	118
Banque (La) du Peuple v. La Banque d'Echange.....	134	Bogue v. Brouillet.....	348
Banque (La) Jacques Cartier v. Thibaudeau	28	Boileau v. Seers.....	135
Banque (La) Nationale v. Eastern Town- ships Bank.....	219	Bondy v. Valois.....	134
Banque Nationale v. Noel.....	187	Bonnin v. Coté.....	70
Banque Nationale v. Ross et al.....	252	Boston v. South Boston Iron Co.....	66
Banque (La) Ville Marie v. Rocher.....	332	Brault v. La Corporation de Québec....	48
Barker v. City of Worcester.....	145	Brazier v. Léonard.....	340
Barrande & Barrande.....	349	Bridger v. Savage.....	361
Barras & The Corporation of Quebec....	131	Brosseau v. Brosseau.....	226
Barter v. Smith.....33, 202, 210,	220	Brouillet v. Bogue.....	330
Bartley v. Breakey.....	160	Brown v. Ross et al.....	68
Beatty v. North-West Transportation Co.	228	Brunelle v. Brosseau.....	99
Beauchemin v. Hus.....	332	Brunet v. L'Association Pharmaceutique	378
Beaudry v. La Cité de Montréal.....	134	Bryant v. City of St. Paul.....	254
Beaulieu v. Hayward.....	7	Burbank v. Chapin.....	368
		Burdock v. Sewell.....	135
		Burland & Moffatt.....	147
		Bury & Samuels.....	394
		Butler v. Redmond.....	84

Cannavan v. Bryson.....	134	Corporation du Séminaire de St. Hyacinthe d'Yamaska & La Banque de St. Hyacinthe	354
Carter & Molson.....	281	Corporation of Pilots v. Brigantine "J. A. Horsey"	7
Caty et al. v. Perrault.....	2	Coursol et al. & Les Syndics de la Paroisse de Ste. Cunégonde	362
Cayionnette v. Girard.....	101	Cowan v. Cowan.....	216
Champagne v. Goulet.....	118	Creed v. Henderson	305
Charlebois & Charlebois.....	17	Crowley v. Chrétien.....	68
Chatterton v. Crothers.....	261	Curtis v. Murphy.....	198
Chicago v. O'Brien.....	8	Cushing & Dupuy.....	140
Chisholm v. Langlois.....	101	Cyr & Bryson	378
Cholette v. Bain.....	17		
Cité de Montréal v. Beaudry et al.....	348	Daniel v. Whitfield	392
Cité de Montréal v. Fennell.....	158	Danseau & Letourneux.....	275
City of Montreal & Hall.....	17, 190	Darveau v. Cyprien	84
Cité de Montréal v. Les Ecclésiastiques du Séminaire, etc.....	347	De Bellefeuille v. D'Odette Dorsonnens ...	197
Cité de Montréal v. Lionais.....	402	De Bellefeuille v. Ross et vir.....	133
City of Montreal & Walker.....	395	De Bellefeuille v. Ross, et Stearns	227
City of New York v. Sturtevant.....	8	De Maisonneuve v. Larue, & Labranche T.S	28
Clarke v. Chicago, etc., R. Co.....	304	Desmarais v. Picken	101, 377
Cole v. Western Union Telegraph Co....	104	Demers v. Germain	253
College (Le) des Médecins & Chirurgiens de la Province de Québec v. Chivé. .	342	Denis v. Denis	82
Cie. de Prêt et Crédit Foncier v. Lemire	348	De Souza, <i>Id re</i>	105, 146, 232
Cloran v. McClanaghan.....	246	Dickson et al. & Galt	354
Compagnie de Navigation du Richelieu & Ontario & St. Jean.....	152	Diénaide v. Les Chemins de fer de l'état .	135
Compagnie du Chemin de Fer Central & Legendre.....	252	Dionne v. Bonami	69
Compagnie du Chemin de Péage de la Pointe Claire & Leclerc.....	234	Dionne v. Canadian Pacific Railway Co..	101
Compagnie du Grand Tronc & Meegan...	275	Dixon v. Mail Printing Co.....	378
Commissaires d'Ecole de St. Norbert v. Crépeau.....	253	Dominion Abattoir Co. & Hédge.....	354
Commissaires d'Ecole de St. Roch Nord & Le Séminaire de Québec.....	83	Dominion Type Co. v. Pacaud	117
Commonwealth v. Iron Co.....	7	Dong Tong, <i>Re</i>	89
Commonwealth v. Keeper of the County Prison.....	66	Dorion & Dorion... ..	410
Connecticut Mutual Life Insurance Co. v. Scott.....	104	Downie v. McLennan	198
Conway v. Canadian Pacific Railway Co.	322, 332	Doyle v. Bell.....	12
Cooper v. Whittingham.....	1	Driscoll v. O'Rourke	227
Coristine et al. v. Lizotte.....	402	Dufour & Boy	75
Corporation (La) de Dorchester & Collet.	156	Dulac & Bolduc	370
Corporation de Ste. Anne du Bout de l'Isle & Reburn.....	67	Dupaul v. Wheeler.....	99
Corporation de Québec & Piché.....	18	Dupuis v. Rieutord	266
Corporation de St. Joseph, Beauce, & The Quebec Central Railway Co.....	82	Durocher v. Lapalme et al.....	378
Corporation du Sacré-Cœur & La Corpora- tion de Rimouski	61	Dussault v. Bedard.....	188
		Eager v. Lajeunesse.....	190
		Elliot v. Lord et al.....	313, 342
		Estes v. Williams.....	49
		Exchange Bank of Canada v. Canadian Bank of Commerce.....	134

TABLE OF CASES.

V.

Exchange Bank of Canada v. Burland...	18	Jodoin v. La Compagnie du Chemin de Fer du Sud-Est.....	227
Eynard et al & Mohamed et al.....	371	Jones et al. & Laurent et al.....	341
Fabrique de Varennes & Choquet.....	245	Jones et al. & Powell.....	411
Farrer v. Nelson.....	192	Juif & Chambard.....	378
Filiatrault v. Elie.....	60	Julien v. Prevost.....	143
Filiatrault v. La Corporation de St. Zotique	227		
Fisher & Evans.....	355	Killoran v. Waters.....	160
Flagg v. Baldwin.....	8	Kinloch et al. v. Robichon.....	170
Fournier v. Leger.....	267	Knapp v. City of London Ins. Co.....	89
Fournier v. Morin.....	252	Knudsen v. Lightbound et al.....	188
Fraser & Jones.....	178		
		Lachambre v. Normandin.....	186
Gadous et al. v. Tassé.....	385	Lacroix v. Ross.....	189
Gagnon v. Gaudry et vir.....	266	Laflamme v. Mail Printing Co.....	267
Gagnon v. Hall.....	71	Laframboise v. Rolland.....	267
Gale et al. v. Canadian Iron & Steel Co....	341	Lalonde v. Rochon.....	341
Gallagher v. Corporation de Québec.....	187	Lamarche v. La Banque Ville Marie.....	133
Garon & Lamontagne.....	194	Lambe v. North British & Mercantile Ins. Co.....	26, 42
Gandry et vir v. Judah.....	371	Lambe v. The Ontario Bank.....	26, 42
Gauthier v. Dupras et al.....	402	Lane v. Collins.....	1, 4
Gauvreau v. Quinn et al.....	7	Lareau v. Leclerc.....	344
Gilbert v. Hoffman.....	216, 345	Lareau v. Vermont Central R.R. Co.....	341
Giles es qual. v. Faneuf.....	245	Larin v. Kerr.....	340
Giles es qual. v. Jacques.....	100	Larivière v. Choquette.....	348
Gingras & Symes.....	17	Larson v. Berquist.....	401
Glendevon, The.....	56	Last v. London Assurance Corporation ..	360
Goring v. London Mutual Fire Ins. Co....	261	Lauderdale Peerage Case ¹	193, 241
Goudron v. Lemonier.....	100	Laurent v. Paquin et al.....	266
Grant & The Federal Bank of Canada....	396	Lavallée v. Letourneux.....	378
Guimont v. Léonard.....	171	Lavolette v. Bossé.....	340
		Lavolette v. Thomas et al.....	266
Hamilton Powder Co. & Lambe.....	395	Lavigne v. Hébert.....	188
Hanawalt v. State.....	346	Lebeuf v. Daoust.....	134
Hannan et al. v. Evans et al.....	132	Lecomte v. Cotret.....	234
Harris v. Hyneman.....	102	Leduc v. La Cité de Montréal.....	226
Hebert et al. v. Paquet.....	160	Lefebvre v. Bacon et vir.....	187
Higgins v. Power et al.....	197	Lefebvre & Palade.....	364
Hill v. Nation Trust Co.....	254	Legris v. Cornellier.....	378
Hillyard v. Grand Trunk Railway Co....	261	Legru v. Dufresne.....	227
Holmes & Carter.....	281	Lemay v. Welch.....	400
Hebert & The City of Montreal.....	152	Lemieux & La Cour des Commissaires, etc	402
Hus v. Charland.....	12	Lemieux v. Lemieux.....	117
		Lemieux v. Phelps.....	226
Jackson v. Cuthbert.....	68	Lemieux v. Syndics de St. David de l'Aube Rivière.....	83
Jackson v. Staley.....	263	Lemoine, Ex parte, & Doré.....	342
Jarry v. Sénécal.....	331	Leonard v. Premio-Real.....	253
Jeannotte dit Bellehumeur v. Burns.....	266	Leprohon v. De Bellefeuille.....	100
Jodoin v. Archambault.....	245	Leprohon v. Robb.....	3

Letterstedt v. Broers	13	Montel v. Duhamel.....	315
Levesque v. Daigneault.....	332	Montreal City Passenger Railway Co. & Parker.....	393, 396
Lighthall & Craig	152	Montreal, Portland & Boston Railway Co. & Hatton.....	11, 274
Likefield v. Likefield.....	177	Morier & Loupret & Tassé.....	411
Liquor License Act, 1883, <i>Re</i>	26, 379, 409	Morris v. Canadian Iron & Steel Co.....	341
Lizotte v. Deschesnaux.....	331	Morris v. Currie et al.....	196
Lohnes v. SS. Barcelona	56	Morse v. Martin.....	17
London Guarantee and Accident Co. v. Geddes	5	Mouneau v. Demoury.....	191
Loranger, Atty. Gen. & Reed.....	50, 58	Mulholland v. Morrison..	188
Lord et al. & Davison	395	Municipalité (La) du Village du Mile End v. La Cité de Montréal.....	337, 353
Lord v. State	318	Munn & Berger et al.....	385
Low v. Bain	110, 201	Myers v. Kalamazoo Buggy Co.....	15
Lunn v. Windsor Hotel Co.....	39		
Macdougall & Prentice	163	Nadeau v. St. Jacques.....	226
Macfarlane v. McIntosh.....	347	Nash v. El Dorado County.....	273
Mackie v. Vigeant	330	National Bank v. Oscaloosa Packing Co..	200
Mackill v. Morgan et al.....	196	Neave v. Hatherley.....	254
MacLaren v. Commercial Union Ins. Co..	12	Normandin v. Berthiaume.....	331
Macmaster et al. & Moffatt.....	361	Normandeau v. Langevin et vlr.....	116
Maguire v. Donovan	7		
Mainville v. Legault	226, 347	Ogden & Dawson.....	253
Martin v. De Montigny et al	196	O'Shaughnessy v. La Corporation de Ste. Clothilde de Horton.....	253
Martin v. Guyot	101	O'Sullivan v. Harty	228
Mary Russell, The	7	Quimet & Normandin.....	11
Matte v. Davis	133		
Mathieu & Vachon et al	252	Paquet v. Canadian Pacific Railway Co..	78
Maury v. Durand	266	Paradis v. Poirier.....	189
May v. Fournier.....	330	Park v. Rivard.....	226
Mayer et al. v. Leveillé.....	348	Patience v. Main	382
McCorkill v. Barrabé	245	Pauzé v. Senécal	348
McDonald v. Messier.....	83	Peachy et al. & O'Neill.....	11
McGibbon es qual. & Abbott es qual ..	267	People v. Muller.....	63
McMillan & Hedge	354	People v. Woods.....	14
McShane & Henderson et al.....	152	Perrier et al. v. Quinn.....	19
Mercier v. Canadian Pacific Ry. Co.....	61	Petit dit Lalumière v. Crevier	227
Merrill et al. v. Griffin.....	246	Picard v. Bérard	347
Mesurie v. Canadian Pacific Railway Co.	79	Piché v. Bernier.....	84
Methot v. Dunn	134	Pillow & The City of Montreal....	354
Metras & Trudeau	274	Pipe v. Crevier.....	134
Mignonette Case	40, 185	Poirier v. Laberge.....	132
Miller's Appeal.....	15	Poitevin v. Etienne et al.....	157
Miller v. Cleroux	134	Pomerville v. Gauthier.....	157
Mireault v. Brunet	60	Pool v. Lewin.....	1
Minogue v. Quebec Fire Assurance Co.	340, 377	Pratte v. Maurice et al.....	267
Minto v. Foster et al.....	348	Prescott v. Thibault.....	102
Moisan v. Prevost	187	Prevost & La Compagnie de Fives-Lille..	297
Molleur v. Loupret.....	305		
Molson & Lambe.....	196		
Monjo, Ex parte.....	102		

TABLE OF CASES.

VII.

Prince v. I. & G. N. R. Co.....	216	Rousseau v. La Compagnie d'Assurance Royale.....	331
Pritchard v. Standard Life Ass. Co.....	12	Roy & La Compagnie du Grand Tronc.....	275
Puchen v. La Compagnie du Nord.....	111	Roy & Lepage.....	369
Pullman Palace Car Co. v. Gaylord.....	7	Rowan v. Massé.....	101
Quinn v. Fraser.....	62		
Quintal v. Aubin.....	60, 331		
Raymond dit Lajeunesse & Latraverse... ..	244	Samson et al. & Adam.....	373
Reed v. Rascony.....	241	Samuel et al. v. Houliston et vir.	402
Regina v. Arscott.....	361	Saxton v. Paradis.....	341
" v. Ashwell.....	105, 122, 177, 409	Senécal v. Hart.....	339
" v. Austin.....	189	Sergeant (In re) Mertens v. Walley.....	217
" v. Bank of Nova Scotia.....	321	Shackleton v. Sun Fire Office.....	8
" v. Bunting et al.....	144	Sharon v. Hill.....	281
" v. Butt.....	20	Sharpe et al. & Cuthbert et al.....	396
" v. Considine.....	307	Silcot v. Papineau dit Montigny.....	226
" v. Cox & Railton.....	125	Slessor et al. v. Désilets.....	226
" v. Dee.....	29	Smardon v. Lefebvre.....	330
" v. Denault.....	250	Smith v. Wheeler.....	2
" v. De Portugal.....	379	Soucis v. Buchanan.....	371
" v. Hollis.....	229	Stapley and Smith (Re).....	240
" v. Jarrett.....	384	Starnes & Molson.....	354
" v. Jones.....	13	State v. Horan.....	14
" v. Judah.....	124	State v. Jones.....	88
" v. Leblanc.....	114	St. John's Bridge, Re Expropriation.....	341
" v. Macdonald.....	225	Ste. Marie v. Beaugrand.....	245
" v. Provost.....	395, 396	St. Michel v. Vidler.....	101
" v. Riel.....	335, 337, 355, 397, 403	St. Lawrence Sugar Refining Co. & Camp- bell.....	233
" v. Ritson.....	13	Stevens & Fisk.....	42, 53
" v. Ross.....	151	Stoker v. People.....	225
" v. Sheppard.....	305	Sullivan v. Knykendall.....	104
" v. Smith.....	136	Sulte v. Corporation of Three Rivers.....	17, 28
" v. Stansfeld.....	123	Surprenant v. Surprenant.....	186
" v. Sternberg et al.....	122	Susquehanna Mut. Fire Ins. Co. v. Cusick.....	254
" v. Tassé.....	98, 105	Sweeney v. Bank of Montreal.....	401, 403
" " Tranchant.....	259	Syndics (Les) de Ste. Cunégonde v. Coursol.....	133
" " Yates.....	24	Swinburn v. Ainslie.....	104
Riendeau v. Blondin.....	332		
Riendeau v. Casey.....	330	Thayer v. Ross.....	90
Rioux v. Ouellet.....	252	Théoret v. Ouimet.....	197
Robichaud v. La Compagnie du Pacifique Canadien.....	314	Thibaudeau et al. & Mills et al.....	244
Robillard v. Finn.....	79	Thomas v. Charbonneau.....	187
Rochette v. Rochette.....	84	Thomas v. Cumisky.....	254
Ross v. Blouin.....	160	Thompson v. The Molsons Bank.....	363
Ross & Langlois.....	152	Toronto Telephone Manufacturing Co. v. Bell Telephone Co.....	34
Ross et al. v. Rouleau.....	340	Towers v. Dominion Iron Co.....	228
Ross et vir v. Starnes et al.....	342	Treacy et vir & Liggett et al.....	5
Ross v. Thompson et al.....	48	Trepanier, Ex parte.....	189
Rouleau v. Lalonde.....	322, 331		

Tye & Fairman	411	Wadington v. Crédit Lyonnais.....	372
Ulrich v. Hudson River R.R. Co	89	Weldon v. De Bathe	26
Union Bank of Lower Canada v. Dawson.	253	West Northumberland Election Case....	228
Union Bank of Lower Canada & Nutbrown	7, 76	Westover v. Ætna Life Ins. Co	224
		Whitehead v. Kieffer & White	6
		Whitehead v. Kieffer et al.....	197
Valiquette v. Valiquette	61	Whitehead et al. & White.....	410
Van de Vliet v. Fénlou.....	133	Williams v. Beauchemin et al.....	348
Van Houten v. State	13	Williams Manufacturing Co. v. Lalonde .	171
Vézina v. Gibeau	2	Wilson v. Wood	262
Viau et al. & La Corporation de la Longue Pointe	110	Wiseman v. McCulloch.....	266
Vincelette v. De Montigny.....	330	Wright & Moreau et ux.....	371
Vickers Express Co. v. Canadian Pacific Railway Co	229	Wylie & Cité de Montréal.....	155, 273
Vincent v. Moore	3		
Wade v. Canadian Pacific Railway Co....	348	Young et al. & Rattray	10, 377

ERRATA.

On p. 217 the first paragraph should begin: "A case bearing a slight resemblance to the cabman's case, etc."

On p. 250 for "La Rue" read "La Reine."

On p. 337, for 1152 C.C. read 1087 C.C.

On p. 369, 2nd col., for "93" read "90."

The Legal News.

VOL. VIII. JANUARY 3, 1885. No. 1.

There has been some difference of opinion in our courts as to the right of the higher tribunal to interfere with the discretion of the lower in the matter of costs, where nothing else is complained of. It seems to be pretty well settled now that a case may be taken to Review, and the judgment reformed, on a mere question of costs; and although the Court of Appeal does not encourage appeals for costs, the majority of the judges have never laid down a cast-iron rule forbidding such appeals, where the Court below appears to have acted on a wrong principle. In England, the Court of Appeal does recognise the right of appeal for costs, and in a recent case, *Pool v. Lewin*, noted in the *Law Journal*, the Court restored the plaintiff his costs, of which he had been deprived by the judge at the trial, no misconduct of any kind being shown on his part. The principle on which the English Court acted is laid down by the late Master of the Rolls (Jessel) in *Cooper v. Whittingham*, 49 Law J. Rep. Chan. 752, in these terms:—"Where a plaintiff comes to enforce a legal right, and there has been no misconduct, omission, or neglect on his part which should induce the Court to deprive him of his costs, the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts. For instance, there may be misconduct in conducting the proceedings, some miscarriage in the procedure, or some oppressive or vexatious conduct on the plaintiff's part or in his mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it."

A telegram appeared in the papers lately about a man who came out to America in order to marry his aunt. The *Law Journal* (London) says:—"The man who is said to have travelled 4,000 miles in order to marry

his aunt did not gain much by his journey. No doubt he managed to obtain a marriage ceremony which he could not have obtained in England without concealing his relationship; but although he fled to Wisconsin, his domicile was still in England. If his taste had been a little more mature, and he had chosen his great-aunt, there would have been no difficulty whatever."

That milk is milk, after the cream has been taken off, has been decided by the English Queen's Bench Division in *Lane v. Collins*, a note of which appears elsewhere. The process of skimming may not be an adulteration, but it affects the consumer more seriously than a slight addition of water to fresh milk. The buyer, it would appear, in order to be protected, must ask for "unskimmed milk."

The *New York Herald*, of Dec. 25, refers to a decision of the General Term of the Supreme Court in that city, which, it remarks, if allowed to stand, will subject wharf owners to a very stringent liability. A boat loaded with sand reached a dock at Port Chester during the night. The sand was consigned to the owner of the wharf. The captain asked a watchman on the dock where he should land. The latter replied that he did not know, but pointed to a part of the dock where he said sand had been unloaded before. The captain landed at this place, and when the tide went out the boat settled on the bottom and was badly damaged by reason of the ground being uneven. An action for damages was brought against the owner of the dock. The defence was that it was not the business of the watchman, nor had he any authority, to give directions about the landing of boats, and that in this case the captain had moored at a place where the defendant was not in the habit of receiving sand. The Court says:—"But the fact that the watchman was on the premises, in their apparent charge and possession, was a direct indication that he so far represented the defendant as to be authorized to indicate what might properly be done by a vessel arriving at the wharf in the defendant's business during the night time, when no other

person was to be found who could be consulted. The fact of his being there in the service of the defendant was an indication that it was his duty, as well as his authority, to look after his employer's affairs, and in so simple an act as the mooring of a vessel could indicate where she might be properly and safely placed." From this decision Judge Davis dissented, on the ground that the watchman had no authority and that the captain of the boat was guilty of contributory negligence.

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, NOV. 28, 1884.

Before LORANGER, J.

SMITH v. WHEELER.*

Evidence—Action en séparation de corps.

Held, 1. That the admission of the consort, defendant in an action *en séparation de corps*, whether the admission be judicial or extrajudicial, is inadmissible in evidence. The prohibition contained in Articles 186, 193 and 1231 of the Civil Code is absolute, and leaves the judge no discretion in the matter.

2. In such case, an allegation of the declaration in these words, "the whole as confessed and admitted by the defendant," may be rejected on motion.

Motion granted.

Robertson, Ritchie, Fleet, & Falconer for the plaintiff.

Greenshields, McCorkill, & Guerin for the defendant.

SUPERIOR COURT.

MONTREAL, NOV. 22, 1884.

Before TASCHEREAU, J.

CATY et al. v. PERRAULT.*

Vente de biens substitués—Conseil de famille—Effet de l'Ordonnance du juge—Formalités—Nullités.

JUGÉ:—1o. Que d'après le droit et la jurisprudence existant en France avant l'ordon-

*To appear in Montreal Law Reports.

nance de 1747, tout grevé de substitution pouvait et devait, avec l'autorisation judiciaire, aliéner les immeubles sujets à la substitution, pour cause nécessaire et lorsqu'il y avait urgence d'acquitter des dettes grevant les biens substitués et de prévenir la vente par décret des dits biens, et que telles aliénations étaient finales et ne pouvaient être résolues à l'ouverture de la substitution.

2o. Que dans un conseil de famille composé d'amis, le défaut d'y avoir convoqué tous les parents et alliés résidant dans le district, n'entraîne pas la nullité des actes de l'assemblée, si d'ailleurs les parents n'y ont pas été systématiquement exclus, et si cela ne cause aucun préjudice aux mineurs.

3o. Que l'ordonnance judiciaire prononçant sur l'avis du conseil de famille couvre toutes les irrégularités antérieures de manière à protéger les tiers, spécialement dans une vente de biens de mineurs.

4o. Qu'avant l'ordonnance de 1747, la présence seule du tuteur ou du curateur à la substitution, à une vente de biens de mineurs était suffisante, le concours d'un tuteur aux appelés alors nés n'était pas nécessaire.

5o. Que l'absence du concours des appelés à une substitution dans les procédés judiciaires faits pour arriver à la vente des biens substitués ne peut être invoquée que par les dits majeurs eux-mêmes.

Mercier, Beausoleil & Martineau pour les demandeurs.

Lacoste, Globensky, Bisillon & Brosseau pour les défendeurs.

COUR DE CIRCUIT

MONTREAL, 17 déc. 1884.

Coram LORANGER, J.

VÉZINA v. GIBBEAU, & GIBBEAU, Opposant.

Affidavit—Commissaire de la Cour Supérieure—Opposition.

JUGÉ:—Que les lettres C. C. S. à la suite du nom du commissaire de la Cour Supérieure qui a reçu un affidavit, sont une indication suffisante de sa qualité et de sa juridiction.

Le demandeur prétendant que par cette indication laconique, le commissaire ne faisait pas apparaître de sa juridiction, et que

c'était là une cause de nullité de l'opposition, en demanda le renvoi par la motion suivante :—

Motion du demandeur, qu'attendu qu'il n'appert pas par l'*affidavit* produit au soutien de la présente opposition, que la personne qui a reçu cet *affidavit*, Jos. Chartrand, soit une personne autorisée à recevoir des *affidavits* pour ce district, ladite opposition soit en conséquence renvoyée avec dépens.

Et au soutien de sa motion, le demandeur a cité les décisions rendues dans les causes suivantes :—*Leclerc v. Blanchard*, 12 L. C. J. 236; *Duhaut v. Lacombe*, 16 L. C. J. 111.

De son côté, l'opposant a cité une cause beaucoup plus récente, dans laquelle le contraire a été décidé, celle de *Wood v. Ste. Marie & Ste. Marie*, opposant, 21 L. C. J. 306.

Et la cour, après délibéré, a renvoyé la motion du demandeur avec dépens.

Motion renvoyée.

Longpré & David, pour l'opposant.

Loranger & Beaudin, pour le demandeur.

(J. G. D.)

COUR DE CIRCUIT.

MONTREAL, 17 avril 1884.

Coram LORANGER, J.

VINCENT v. MOORE.

Vente—Défauts non apparents—Action rédhibitoire.

Jugé :—*Que les vices ou défauts non apparents, mais pouvant être découverts par un examen minutieux, ne donnent pas lieu à l'action rédhibitoire, bien que le vendeur n'ait pas déclaré à l'acheteur les vices de la chose vendue qui étaient à sa connaissance et bien qu'il fût de mauvaise foi.*

Le demandeur avait acheté du défendeur, pour consommation alimentaire, deux cochons chez lesquels il ne découvrit qu'après la vente, des défauts qui les rendaient impropres à l'objet pour lequel il les avait achetés. De là la présente action demandant l'annulation de la vente pour vices rédhibitoires.

Le défendeur a plaidé à cette action, que la vente avait été faite ouvertement, dans un marché, et sans aucune garantie de sa part

et que du reste les cochons par lui vendus au demandeur n'avaient ni défauts cachés, ni vices rédhibitoires et que l'action du demandeur était mal fondée et devait être renvoyée.

A l'enquête, il fut prouvé que les cochons en question étaient tout simplement propres à la reproduction de l'espèce, ce à quoi ne s'attendait pas le demandeur qui les avait achetés dans un autre but; mais il fut également établi que par un examen minutieux, il aurait pu facilement découvrir les défauts qu'il traitait comme vices rédhibitoires par son action.

PER CURIAM. Je crois les prétentions du demandeur mal fondées; il invoque comme vices rédhibitoires, ce qui n'en était pas. Il aurait dû faire avant l'achat, un examen plus minutieux des cochons en question et nul doute qu'il aurait alors découvert les défauts dont il se plaint maintenant. Il ne l'a pas fait, et s'il a été trompé, il ne peut en imputer la faute qu'à lui seul. Il est vrai qu'il invoque aussi la mauvaise foi du défendeur, mais dans le cas actuel, rien ne justifie l'action rédhibitoire du demandeur et elle est renvoyée avec dépens.

Action renvoyée.

J. B. Doutre, pour le demandeur.

Quinn & Purcell, pour le défendeur.

(J. G. D.)

COUR DE CIRCUIT.

MONTREAL, 13 novembre 1884.

Coram MATHIEU, J.

LEPROHON v. ROBE, & DUFOIS et PRINGLE,
Intervenants.

Saisie-gagerie — Sous-locataires — Interventions — Dépens.

Jugé :—*Que vu que le demandeur savait que les intervenants étaient sous-locataires du défendeur, bien qu'il ne sût pas s'ils avaient payé leur loyer, ces derniers avaient droit non-seulement à la distraction de leurs effets, mais encore aux frais de leur intervention respective contre le demandeur.*

Le demandeur a fait pratiquer contre le défendeur, son locataire, une saisie-gagerie pour arrérages de loyer s'élevant à la somme de \$80.

Au nombre des effets saisis, se trouvaient ceux des intervenants, sous-locataires du défendeur.

Lors de la saisie, le demandeur savait que les intervenants étaient sous-locataires du défendeur, mais ignorait s'ils lui devaient ou non du loyer.

A l'encontre de la saisie pratiquée sur leurs meubles et effets, les sous-locataires, Dupuis et Pringle, ont fait des requêtes en intervention, par lesquelles ils ont demandé non-seulement la distraction de leurs effets, mais de plus à ce que le demandeur fût condamné en leurs dépens. Il fut prouvé qu'ils avaient payé leur loyer en entier.

Voici, du reste, le jugement de la cour qui met en pleine lumière tous les faits relatifs à ces interventions et toutes les questions qui s'y rattachent :

“ La cour....

“ Attendu que le demandeur n'avait pas stipulé comme condition de son bail au défendeur, que ce dernier n'aurait pas le droit de sous-louer ou de céder son bail, et que par l'art. 1638 du Code Civil, le locataire a droit de sous-louer ou de céder son bail, à moins d'une stipulation contraire ;

“ Et attendu qu'il a été admis à l'audience par le demandeur, que le défendeur avait sous-loué aux intervenants en cette cause, partie des lieux à lui loués par le demandeur et que celui-ci qui connaissait cette sous-location, n'en a pas moins fait saisir, en vertu du bref de saisie-gagerie émané en cette cause, les effets mobiliers des dits intervenants, mentionnés dans leurs interventions ;

“ Considérant que le demandeur a admis lesdites interventions, mais prétend qu'il ne peut être condamné à en payer les frais, vu qu'il ne connaissait pas si les intervenants avaient ou non payé le loyer qu'ils devaient au défendeur ;

“ Considérant que les intervenants ont prouvé qu'ils avaient payé tout le loyer qu'ils devaient au défendeur ;

“ Considérant qu'il résulte des faits ci-dessus que le demandeur a, sans droit, fait saisir les effets mobiliers des dits intervenants et qu'il n'est pas juste, dans les circonstances, que les intervenants soient forcés de payer des frais qu'ils ont été obligés de faire pour se soustraire à la saisie pratiquée par le

demandeur sur leurs biens meubles ; et que si quelqu'un doit supporter ces frais, ce doit être le demandeur, qui a attaqué et fait saisir les intervenants sans aucun droit et lorsqu'il n'avait pas de privilège sur leurs biens meubles et effets :

“ A maintenu et maintient les interventions des dits Ernest Dupuis et James Pringle, et a distrait de la dite saisie-gagerie, comme appartenant respectivement aux dits intervenants, les effets mobiliers mentionnés dans lesdites interventions, et a donné aux dits intervenants, mainlevée de ladite saisie-gagerie et a condamné et condamne ledit demandeur, à payer aux dits intervenants respectivement, les frais des dites interventions, lesquels sont distraits à M^{tres} Downie & Lanctot, avocats des intervenants.”

Interventions maintenues.

DeBellefeuille & Bonin, pour le demandeur
Downie & Lanctot, pour les intervenants.

(J. G. D.)

QUEEN'S BENCH DIVISION.

LONDON, Dec. 16, 1884.

LANE, Appellant, v. COLLINS, Respondent—
(Law J., Notes of Cases.)

Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Adulteration—Sale of Milk with Cream Abstracted—Prejudice of Purchaser.

The respondent was charged, under section 6 of 38 & 39 Vict. c. 63, with selling an article of food—viz. milk—which was not of the nature, substance, and quality of the article demanded by the purchaser.

A pint of the milk in question was sold to the appellant for twopence, and was admittedly “60 per cent. butter-fat deficient.”

The magistrate held that no offence had been committed under section 6 by the skimming of the milk, the purchaser having only asked for “milk.”

S. Day, for the appellant, submitted that the purchaser, having asked for milk, should have been supplied with unskimmed milk, and that an offence had therefore been committed by the vendor under section 6 of the Act of 1875.

The Court (MATHEW, J., and DAY, J.) held that the magistrate's decision was right.
Appeal dismissed.

SUPREME COURT OF CANADA.

OTTAWA, Jan. 16, 1884.

Before RITCHIE, C. J., STRONG, FOURNIER, HENRY
and GWYNNE, JJ.

TREACY et vir (defts.), Appellants, and LIGGETT
et al., (plffs.) Respondents. (9 S. C. Rep.
Can. 441.)

C. C. P. 803, 1034—*Donation in marriage contract—Proof of insolvency of donor at date of donation necessary to set aside.*

On the 28th June, 1876, the plaintiffs sold to T., a property for \$12,250, of which price \$3,789 were paid in cash. On the 16th June, 1879, T.'s daughter married one K., and in the contract of marriage T. made a donation to his daughter of real estate of considerable value, the only property remaining to him being that sold to him by the plaintiffs. In July, 1881, the plaintiffs brought an action to set aside the gift in question, claiming that the property sold had become so depreciated in value as to be insufficient to cover their claim for the balance remaining due to them and secured only by the property so sold; that the gift in the marriage contract had reduced T. to a state of insolvency, and had been made in fraud of the plaintiffs, and that at the time the gift was made T. was notoriously insolvent. T. pleaded, *inter alia*, denying averments of insolvency, fraud, or wrong-doing. The only evidence of the value of the property still held by T. at the date of the donation was the evidence of an auctioneer, who merely spoke of the value of the property, in November, 1881, and that of a real estate agent, who did not know in what condition the property was two years before but stated that it was not worth more than \$6,000 in November, 1881, adding that he considered property a little better then than it was two years before, although very little changed in price.

Held, reversing the judgment of the Court of Queen's Bench, (Montreal, 22nd May, 1883,) that in order to obtain the revocation of the gift in question, it was incumbent on the plaintiffs to prove the insolvency or *déconfiture* of the donor at the time of the donation, and that there was no proof in this case sufficient to show that the property remaining to the donor at the date of his donation was inadequate

to pay the hypothecary claims with which it was charged.

Doutre & Joseph for appellants.

Judah & Branchaud for respondent.

U. S. CIRCUIT COURT, N. D. ILL.

THE LONDON GUARANTY AND ACCIDENT CO. V.
GEBBES. (17 Chic. L. N.)

Surety—Rights of Company insuring employer against loss by misconduct of employé.

1. Under the Constitution and statutes of Illinois, which authorize the issuing of a *capias ad respondendum*, upon the filing of an affidavit, showing that the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit is brought, where a guaranty company issued its policy guaranteeing for a consideration an employer, against any losses it might sustain by reason of the want of integrity, honesty and fidelity of an employé, and received from the employer a written agreement in which he stipulated that he would save such company harmless against any loss it might sustain by reason of the issuance of said policy. *Held*, that such company would have the right, in case of an embezzlement of the employé from the employer, and the payment of the loss by it, to arrest and hold to bail such employé.

2. In such case the obligation sued on is contracted and incurred when the embezzlement takes place, not when the agreement to pay is executed.

3. The insurance company stands in the shoes of the employer, and it has a right to be subrogated to all the rights of the employer, in the prosecution of dishonest employées, and the common dictates of public policy would give to the sureties of such employées the same remedy that the defrauded employer would have.

BLONGERR, J. This is a motion to quash the *capias* and discharge on common bail, upon the ground that the affidavit filed does not show a case which authorizes the issue of a *capias*.

The facts set out in the affidavit are briefly these: The plaintiff is a corporation, created in England, with authority to insure employers against loss by reason of the want of integrity, fidelity or misconduct of employées. It is stated in the affidavit that the defendant was an employé of the Grand Trunk Railway Company, as their outside ticket agent at Orillia, Province of Ontario; that, at the request of the defendant, the plaintiff issued

to the Grand Trunk Railway Company its policy, wherein it guaranteed the Grand Trunk Railway Company against any losses it might sustain by reason of the want of fidelity or honesty of the defendant as such employé of the railway company, to the extent of \$800; that, before the issue of this policy, the defendant signed a written agreement, by which he stipulated that he would himself save the plaintiff harmless against any loss plaintiff might sustain by reason of the policy, and also that any account stated by the general accounting officer, or auditor of the railroad company, should be conclusive against the defendant as to the amount of any defalcation of defendant that the plaintiff might be compelled to pay. The affidavit further states that the defendant, after the issue of this policy, embezzled money to the amount of \$546, which came into his hands as such agent and employé of the Grand Trunk Railway Company, and that the plaintiff paid the same, and now seeks to recover, or is about to bring a suit to recover that amount from the defendant.

The only question raised is, whether this shows such a case of fraud as justifies the issue of a *capias*. It is very clear there would be no liability for the amount claimed in this case, but for the embezzlement of the defendant as charged. If this defendant had faithfully and honestly performed his duty to the railway company, the plaintiff would have had no cause of action against him; and I take it, there can be no legal difference in the relation which this guaranty company sustains to the defendant, and the relation which a surety on his bond would have sustained. If he had asked a person to become surety on his bond and then embezzled the money of his employer, and the surety had been compelled to pay it, it would not lie in the mouth of the defendant to say that the liability to the surety did not arise out of a fraud. I find no special authority on this question. This class of contracts is new, and I do not find that they have been very much before the courts as yet, but it seems to me so clear there is hardly room for a doubt that there would have been no right of action but for the fraud of the defendant, and, it seems to me, his surety should have

the same remedy as the original employer would have. He stands in the shoes of the employer, and has a right to be subrogated to all the rights of the employer in the prosecution of dishonest employées. The case is largely analogous to the very numerous class of cases that occur in our Admiralty Courts, where insurance companies are subrogated to the place of the insured, in cases of fraud or negligence on the part of other parties whereby losses occur to ships for which an insurance company is liable and compelled to pay under its policies.

Further than that, it seems to me, there is a principle of public interest involved in this question that should entitle this plaintiff to all remedies that the employer would have. We all know that in cases of large corporations, whose sole business it is to make, handle and disburse money for the benefit of their stockholders, or parties interested in their earnings, if they get their money from the sureties of their dishonest employées, they will not prosecute the employé either civilly or criminally. They will simply stand on their bond, and, if they get the money from the surety, they leave the punishment of the dishonest servant to the man who has suffered, rather than spend their money in prosecutions which either directly or indirectly may punish the wrongdoer; and inasmuch as we know that it is almost the universal custom for bankers, railroad companies and all large corporations, employing numerous agents and servants who handle their funds in one capacity or another, to exact a bond whether it may be such a policy as this, or the ordinary bond, it seems to me the common dictates of public policy should give to the sureties of such employées the same remedy that the defrauded employer would have. The Constitution and statutes of Illinois authorize the issue of a *capias ad respondendum* upon the filing of an affidavit showing that he defendant "fraudulently contracted the debt or incurred the obligation" respecting which the suit is brought, and there seems to me no room for question, as the record now stands, that defendant fraudulently incurred the obligation he is now under to make good this defalcation to the plaintiff.

The motion to discharge on common bail is overruled.

RECENT DECISIONS AT QUEBEC.

Pilotage.—A ship exempt from compulsory pilotage, making the signal for pilot, is liable for pilotage, even if she should afterwards refuse the services of the pilot.—*Corporation of Pilots v. Brigantine "J. A. Horsey,"* (Vice-Admiralty Court, Irvine, J. V. A. C.), 10 Q. L. R. 257.

Saisie-arrest. — *Jugé*, 1o. Que l'enlèvement illégal, par le saisi, de partie des biens saisis-arrestés, avant le cautionnement qui est substitué à la saisie d'iceux, n'affecte pas le recours du saisissant contre les cautions.

2o. Que la validation de la saisie-arrest n'a pour effet que de la convertir en saisie-exécution, et que, lorsque le saisi a, sur cautionnement obtenu possession des effets saisis, la validation de l'arrêt n'a plus d'objet et n'est pas nécessaire pour conserver au saisissant son recours contre les cautions; mais qu'il en serait autrement si l'arrêt avait été annulé.—*Gauvreau v. Quinn et al.* (Sup. Ct., Casault, J.), 10 Q. L. R. 259.

Jurisdiction—Wages.—Where the mariner's contract was made in a foreign country and the voyage terminated in this country: on an action for wages by the seaman, *hild*, that the Court here should not withhold the exercise of its jurisdiction.—*The Mary Russell* (Vice-Admiralty Court, Irvine, J. V. A. C.) 10 Q. L. R. 265.

Servitude—Water course.—The defendant, by the making of a trench or drain, changed the course of a rivulet or stream passing through his property, so as to cause it to pass through the land of the plaintiff where it never passed before; *Held*, that such diversion of the water constituted an illegal servitude on the plaintiff's property.—*Maguire v. Donovan* (Sup. Ct., Meredith, C.J.), 10 Q. L. R. 267.

Donation—Substitution — Résiliation. — *Jugé*, 1o. Que la résiliation, par le donateur et le donataire, de la donation créant une substitution en faveur des enfants à naître du donataire, n'affecte pas la substitution, ni les droits des appelés.

2o. Que le grevé qui remet au substituant

les biens donnés, pour demeurer quitte envers lui des prestations dont le charge l'acte créant la substitution, ne peut pas, avant sa mort, faire remise aux appelés des biens substitués.

3. Que la substitution ne peut être créée que par un acte à titre gratuit, et que celle stipulée en faveur des enfans à naître du grevé par un acte intitulé donation, mais dont les charges excèdent la valeur des biens donnés, peut être résiliée par le concours seul du substituant et du grevé.—*Beaulieu v. Hayward*, et *Letellier*, oppt. (C. R., Stuart, Casault et Caron, JJ.) 10 Q. L. R. 275.

Evidence—Hypothec.—1. The allegation of the granting of a hypothec is in effect an allegation that the person creating the hypothec had power to do so, and therefore under such allegation, the Court will admit evidence to prove the existence of such power.

2. (Following *Renaud v. Proulx*, 22 L. C. J. 126), the plaintiff in a hypothecary action must prove that the grantor of the mortgage was proprietor of the immovable hypothecated at the time the mortgage was granted.—*Union Bank v. Nutbrown* (Ct. of Review Meredith, C.J., Stuart & Casault, JJ.) 10 Q. L. R. 287.

RECENT U. S. DECISIONS.

Inspection of the Books of a Corporation.—The books and papers of a trading corporation are the common property of all the stockholders; and unless the charter provides otherwise, a shareholder has the right to inspect such books and papers and to take minutes from them for a definite and proper purpose at reasonable times. A writ of mandamus may go against the corporation at the instance of a stockholder to inspect the corporate books and papers in reference to some distinct, defined dispute as to which the shareholder wishes to file a bill against the corporation, and such inspection is necessary to enable him to state the facts in his bill.—*Commonwealth v. Iron Co.*, S. C. Pa.; 15 Pittsb. Leg. Jour., 142.

Liability of Sleeping Car Co.—A sleeping car company is not liable for valuables stolen from one occupying a berth unless negligence is shown on its part. The carrier's or innkeeper's liability does not apply.—*Pullman*

Palace Car Co. v. Gaylord, Ct. App. Ky., Oct. 29, 1884; 8 Ky. L. Rep. 279.

Fire Insurance.—Where the owner of a dwelling, who, after a tenant has vacated the premises, moves his furniture into and cleans up the house with an intention of making it his residence, but during that time does not actually occupy it at night, subsequently leaves it temporarily on business, and puts a party in possession until his return, the house cannot be considered as "vacant or unoccupied," within the meaning of a clause in the policy providing that if the insured building shall "be or become vacant or unoccupied" the policy shall be void unless consent in writing is indorsed thereon; and he will be entitled to recover for a loss occurring during such temporary absence.—*Shackleton v. Sun Fire Office*, Sup. Ct. Mich. N. W. Rep. Dec. 6.

Public Sidewalks.—A public sidewalk is a portion of the public highway, and the owner or one in possession of a lot or building cannot be required to remove snow and ice from the sidewalk thereto. A city ordinance requiring this to be done is void.—*Chicago v. O'Brien*, S. C. Ill., Sept. 27, 1884; 18 Rep. 587.

Stock Speculation.—Contracts for speculations in stocks upon margins, when the broker and the customer do not contemplate or intend that the stock purchased or sold shall become or be treated as the stock of the customer, but the real transaction is a mere dealing in the differences between prices; that is, in the payment of future profits or losses, as the event may be, are contracts of wager, dependent on a chance or casualty. Such contracts, if made in this State, are unlawful, and securities given therefor are void by force of the provisions of "the Act to prevent gaming." Such contracts, though made in another State, where they are to be presumed to be lawful and enforceable, will not be enforced here; at least against residents and citizens of this State, because their enforcement would violate the plain public policy of this State on the subject of gambling and betting evinced by the statute above mentioned. In this respect, such contracts are excepted from the rule of comity, which requires the enforcement by the courts of one State of contracts made in another, if

valid by the *lex loci contractus*.—*Flagg v. Baldwin*, New Jersey Ct. of Error and Appeal.

FIRE ESCAPES.

The Supreme Court of New York in the late case of the Fire Department of the City of New York, respondent, v. Albert P. Sturtevant *et al.*, appellants, which was an appeal from an order of the Special Term authorizing and directing the respondent to place upon the hotel of the appellants certain fire escapes, as especially directed in the order, decided that the powers conferred by statute upon the Fire Department of the City of New York to require, by proper notice, the construction of fire escapes in and upon hotels, are clearly constitutional, and are to be exercised in accordance with the sound discretion of the department; and courts of justice will not interfere with the exercise of these powers, unless that exercise is clearly improper. Such proceedings are not open to the objection that the party affected is deprived of his property without due process of law; nor is the right of trial by jury preserved to him therein, or in any just sense applicable thereto. The powers referred to are given to the Fire Department, and the action and direction of the department as such, and not of one of its subordinate officers or bureaus is required.—*Boston Law Record*.

GENERAL NOTES.

THE ADVANTAGES OF ARBITRATION.—"The English profession and the public," says the *New York Daily Register*, "are discussing, with considerable vivacity, the question whether the supposed reform in judicial organization and procedure is really an improvement or not. Some are of opinion that the result has been to render litigation more expensive and to deter the business community from resorting to it. Others attribute the slackness of business to other causes. In this state of things, renewed interest is taken in the question of arbitration as a substitute for litigation, and perhaps as a preliminary. The business view of the question was well illustrated in a trial in this city some time ago, in a commercial cause that had been tried very closely, occupying the greater part of a week. When the defendant came to his part of the case, his affirmative defence was a former adjudication by award. The arbitration and award being proved, the witness who testified to them was asked incidentally how long they were trying the arbitration. 'About fifteen minutes,' was the answer. The jury laughed, and brought in a verdict for defendant."

The Legal News.

VOL. VIII. JANUARY 10, 1885. No. 2.

There is one particular in which we do not adhere to English practice, and the divergence is most certainly not an improvement. In England vacancies which occur on the bench are filled promptly—usually within a few days after the decease or resignation of the previous occupant. Here the Chief Justiceship of the Superior Court has been vacant for several months, and still there is no intimation that a successor to Chief Justice Meredith is about to be named. Meanwhile the Court is incomplete, for the law says that the Superior Court “shall consist of a Chief Justice” and so many *puisné* judges.

It should be clearly understood by the profession that the attempt which, it is said, is about to be made to revive the *Jurist*, is projected in defiance of the unanimous decision of the Editorial Committee to abandon it, of which decision the printer received notice in writing early in October last. If persisted in, it will, in effect, be an undertaking entirely new so far as the preparation of the contents is concerned.

The annual report of the Council of the Montreal Board of Trade again treats of the subject of insolvency legislation. It is stated that the Council has been in correspondence with chambers of commerce in Great Britain, viz.: those of London, Liverpool, Glasgow, &c.,—copies of the bill laid before parliament having been supplied to those bodies. The expression of opinion by these and other chambers is to the effect that the credit of Canada is imperilled by the want of legislation that will protect the interests alike of the home and foreign creditor. The report proceeds to say that “the Council has noticed that, during the recent visit of Sir John A. Macdonald to Toronto, he was waited upon by a deputation from the Board of Trade of that city, on the subject of insolvency legisla-

tion. In his reply, the Premier referred to the popular objections to insolvency legislation, which have thus far proved sufficiently powerful to prevent the passage of a bill. The Council would venture, however, to point out that those objections apply only to the provisions for composition and discharge, which were undoubtedly greatly abused under the old law. They in no way apply to a measure confined in its scope to the equitable distribution of the estates of insolvent debtors, which is all this board has been asking for. Efforts will be continued to secure the passage of a law, during the approaching session of parliament, providing for such equitable distribution.”

The Council also urges the necessity for a revision of the Extradition Treaty. “This question,” the report states, “was brought under consideration in consequence of the frequent instances that have occurred of flagrant criminals, fugitives from justice, having found sanctuary either in the United States or Canada, as the case may be, in consequence of its being alleged that the crimes charged against the parties did not come within the scope of the existing treaty between Great Britain and the United States. A letter embodying the views of the Council regarding the necessity for a revision of it was sent to the Minister of Justice.”

The *Montreal Law Reports* for February are now issued. The Queen's Bench series comprises pp. 49 to 112, and the Superior Court series pp. 49 to 96, making 112 pages in all. A number of important decisions are contained in these issues. In *Gauthier v. St. Pierre* the privilege of counsel while pleading or examining witnesses is fully treated by Mr. Justice Jetté. In *Joubert v. Walsh*, an important question of substitutions is decided by Mr. Justice Rainville. In the case of *St. Lawrence and Chicago Forwarding Co. & The Molsons Bank*, the opinions of the Court are unusually elaborate, the case involving questions of considerable importance upon the law of bills of lading, and the position of banks making advances thereon. Mr. Justice Monk, who dissented, contributes to the

discussion an able and interesting opinion, in which the case for the bank is presented with great clearness. Justices Cross and Ramsay, on the side of the majority of the Court, adopt a view which would require greater circumspection on the part of banks making advances upon such security.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, Dec. 6, 1884.

Before DORION, C.J., RAMSAY, TESSIER, CROSS, and BABY, JJ.

YOUNG et al., Appellants, and RATTRAY, Respondent.

Executor, Powers of—C. C. 914—Legacy—Value of Services—Acquiescence.

The general powers of an executor include the engagement of clerks to keep the books of the estate, and to carry on its affairs. These general powers are not restricted by the fact that the executor has received a legacy under the will, unless it be apparent from the terms of the testament that the legacy was intended as compensation for special services.

The clerk employed by an executor to keep the books of the estate went on for several years receiving \$400 per annum for his services, and himself entered the amount in the books: Held, an acquiescence in that rate of remuneration.

RAMSAY, J. This is an action brought by the respondent on a *quantum meruit* for work done as clerk and agent of the estate of the late D. D. Young, against the representatives of that estate.

The first question that presents itself is whether the representatives of the estate are liable at all, not having employed the respondent. On this point there seems to be no difficulty. Rattray, who was the clerk of the executor Knight, was employed by the latter to do the work, and there is no doubt in my mind that the general powers of an executor justify him in employing those necessary to keep the books of the estate and carry on its business, precisely on the same principle that an executor employs a carpenter or any other mechanic, or a labourer to repair the

houses or cultivate the fields forming part of the estate. Further, I don't think that this general power is modified in the least by a legacy to the executor, unless it should appear by the terms of the will that this legacy was to be the equivalent of certain services. When the law says that the duties of an executor are performed gratuitously, it merely means that for those duties which specially and particularly belong to the executor, and which can be performed by no one else, he shall not charge—for instance, for the exercise of his judgment in making investments, signing documents, and other such acts of a purely personal character. It would be a most extraordinary disposition of the law if it said that when an estate of perhaps \$100,000 passed into the hands of an executor, it should be relieved of the costs of administration. But the law does not say that, but the very reverse. (See 914 C.C.)

The next question is, was there an engagement, express or implied, by Mr. Knight? This question can only be cleared up by Mr. Knight's testimony, and by the circumstances of the case. As to the engagement it is perfectly clear by the testimony of Knight no rate of remuneration was fixed upon at first. He says:—"We should pay him what was right and fair. At that time I believe there was nothing said about a special rate." The difficulty then is to establish what was a "right and fair remuneration." Respondent desires to establish this by general testimony; appellants say that though not settled at first, it became settled by the acquiescence of the respondent, and by his taking deliberately and for a series of years, a remuneration at the rate of \$400 a year. But Mr. Knight tells us that it was worth \$800, and \$800 has been allowed by the judgment appealed from.

The question as to what certain work is worth is often a very doubtful one. It depends much on the scale of remuneration the person performing it receives in other work he does, or what he is able to obtain. It is then much safer to establish the price of work at the rate the parties have agreed upon. Now, in this case, we have ample opportunity of discovering by the course of events what the parties considered

under the circumstances to be sufficient. It is proved that respondent made up the accounts year after year, and took without protest \$400 a year. It is also proved that he made up the accounts of the estate to arrange a *partage*, so that one of the heirs, arrived at the age of majority, might get his share; and there again he calculated his remuneration at \$400 a year. He also on one occasion complained that \$400 was not enough. Mr. Knight put him off, not intending to raise his salary, and he went on taking annually his \$400. In answer to all this, we are told that Rattray was only a clerk; that he entered what he was told, and that his writing does not establish an acquiescence. This is very ingenious, but when it is remembered that efforts were made to show that Rattray was entitled to great remuneration because he really managed the whole estate, it looks very much like a contradiction. But one thing is clear, that he must have known that the estate calculated his services at \$400, and he remained silent for years. Therefore he either acquiesced, which is altogether the more likely presumption, or he was lying by with the dishonest intention of gaining an advantage over his employer. The whole account appears to me to be got up in the utmost bad faith. There are two charges for extra work as a clerk, one of which is abandoned, and both are perfectly unfounded. It is proved that the respondent owes more to the appellants than any claim he has, and therefore his action must be dismissed with costs.

In the case of Rattray & Young et al., the appeal will be dismissed with costs.

TESSIER and CROSS, JJ., dissented.

COURT OF QUEEN'S BENCH.

QUEBEC, Dec. 6, 1884.

Before MONK, RAMSAY, TESSIER, CROSS and BABY, JJ.

PEACHY et al. (plffs. below), Appellants, and O'NEIL (def. below), Respondent.

Mur mitoyen—Console.

RAMSAY, J. This is a paltry action, evidently suggested by the desire to go to law. The respondent's proceedings were not strictly legal, but under the circumstances were almost excusable. At any rate he has

offered a settlement which ought to have been accepted, because it gave all the remedy this court could give. The appellants seek to establish now that the portion of their action which asks that the *mur* should be declared *mitoyen* is still unsatisfied, and that they had a right to a judgment on that head, inasmuch as the sign of *mitoyenneté* had been destroyed. If the fact had been as he states, there would have been a good ground for the appeal; but it is not so. *Le console* is simply moved up, and therefore if it indicated *mitoyenneté* before, it does so still. Again, raising it did no special damage to the plaintiff's house; it was neither an ornament to his house, nor could it be useful as a cut-fire, for it did not accord with the top of the wall. It had been placed to suit respondent's house, and when its place was altered it was to carry out the original intention.

Judgment confirmed.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 19, 1884.

Before DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

THE MONTREAL, PORTLAND, & BOSTON RAILWAY COMPANY (def. below), Appellant, and HATTON, Respondent.*

Appeal Bond—Security in Appeal—Condemnation under C.C.P. 1025.

Held, that on an appeal by the defendant from a judgment ordering a railway company to call the annual meeting within one month, or to pay a fine of \$2,000, security for costs only is insufficient: the security must be to satisfy the condemnation.

M. S. Lonergan for the appellant.

J. L. Morris for the respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 19, 1884.

Before DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

OUMET, es qual. (plff. below), Appellant, and NORMANDIN (def. below), Respondent.*

School Municipality—Action against Secretary-Treasurer—Jurisdiction of Superintendent of Education—40 Vict., c. 22, s. 22 (Q.).

Held (confirming the judgment of Tasche-

* To appear in Montreal Law Reports.

reau, J.), 1. That an action by the Superintendent of Education does not lie under s. 22 of 40 Vict. cap. 22 (Q.), against the secretary-treasurer of a school municipality, after he has rendered his account, and the account has been approved at a regular meeting of the ratepayers and also by the trustees.

2. That even supposing that the action by the Superintendent in this case could be regarded as an action instituted under sect. 36 of the above-mentioned Act, and sect. 19 of 41 Vict., c. 6, the action would not lie until after the trustees had been duly put in default to bring such action, and had refused or neglected to do so.

Abbott, Tait & Abbotts for appellant.

Archambault & Archambault for respondent.

COUR SUPÉRIEURE.

MONTREAL, 14 NOV. 1884.

Coram LORANGER, J.

HUB V. CHARLAND.*

Signification—Cour—Exception à la forme.

JUGÉ: Que la signification d'un bref de sommation, ou de toute autre pièce de procédure, peut être faite dans aucune des chambres du palais de justice, pourvu qu'au moment de la signification la cour ne siège pas.

Loranger & Beaudin, pour le demandeur.

C. A. Geoffrion, C.R., pour le défendeur.

RECENT ONTARIO DECISIONS.

Fire insurance—Damage by removal of goods—Salvage.—The plaintiff's stock-in-trade was insured against loss by fire in the company defendant. A fire occurred in an adjoining building, and the plaintiff's warehouse being in danger of destruction, he removed his stock, which was damaged thereby, and some of it lost. *Held*, that there was a loss covered by the policy, and no salvage to which the defendants were liable to contribute under the fifth statutory condition, which declares that in case of removal of the property to escape conflagration, the company will rateably contribute to the loss and expenses attending such act of salvage. *MacLaren v. Commercial Union Assurance Co.* (Q. B. Division), 20 C.L.J. 420.

*To appear in *Montreal Law Reports*.

Private international law—Administrator—Right to sue for moneys payable in foreign Stat.

—To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which, by one of the terms thereof, was payable in Montreal, P.Q., the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them; and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys. *Held*, on demurrer, a good defence.—*Pritchard v. Standard Life Assurance Co.*, Q. B. Division, 5 C.L.T. 32.

Constitutional law—Dominion Election Act—Penalty—Civil remedy.—*Held*, affirming the judgment of the Court below, that the Parliament of Canada has power to prescribe a civil remedy for breach of the Dominion Election Act by private action for a penalty. *Doyle v. Bell*, Court of Appeal, 5 C.L.T. 30.

Principal and agent—Continuance of relationship—Reasonable time—Evidence.—*Held*, that an agreement, whereby the defendant placed his lands in the plaintiff's hands for sale, and was at liberty to withdraw them or sell the farm himself on payment of a commission, bound the plaintiff for a reasonable time only, no time for the continuance of the agreement being expressed in it. *Held*, also, that what passed verbally between the parties might be received in evidence on the question of what was a reasonable time.—*Adamson v. Yeager*, Court of Appeal, 5 C.L.T. 30.

RECENT ENGLISH DECISIONS.

Trustee—Removal—Misconduct.—It is the duty of a court of equity to see that trusts are properly executed, and therefore, even though no charge of misconduct is made out against a trustee, the court will remove him if satisfied that his continuance in office would be detrimental to the proper execution of the trusts. Friction or hostility between the trustee and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustee, but it will not be disregarded by the court when grounded on the mode in which the trust has been adminis-

tered. Judgment of the Court below affirmed with a variation. Jud. Com. Priv. Council, March 21, 1884. *Letterstedt v. Broers*. 51 L.T. Rep. [N.S.] 169.

Receiving stolen goods—Evidence—Account given by the prisoner—Evidence to negative.—On an indictment for receiving goods, knowing them to have been stolen, the prisoner's account being that he had purchased them of a tradesman in the same town, other circumstances in the case tending to negative it, though the tradesman was not called for the prosecution, *held*, that it was not necessary to call him on the part of the prosecution, there being other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story. Crown Cas. Res., June 28, 1884. *Reg. v. Ritson*. Opinions by Grove, Hawkins, Stephen, Watkin Williams, and Mathew, JJ. 50 L. T. Rep. [N.S.] 727.

False pretences—Obtaining goods by—Proof that the goods were delivered on the faith of—On an indictment for obtaining goods by false pretences, the false pretense charged and proved being that the prisoner was daughter of a lady of the same name, residing at a certain place, there being no evidence that the goods were not delivered to the prisoner before her name and address were asked for, *held*, that there was no sufficient evidence to sustain the indictment, it being essential on a prosecution for obtaining goods by false pretences to prove that the goods were delivered on the faith of the false pretense charged. Crown Cas. Res., June 28, 1884. *Reg. v. Catherine Jones*. Opinion by Grove, Hawkins, Stephen, Watkin Williams, and Mathew, JJ. 50 L. T. Rep. [N.S.] 726.

RECENT U. S. DECISIONS.

Indecent exposure—Public place.—The crime of indecent exposure is committed if a person intentionally makes such exposure in the view from the windows of two neighboring dwelling-houses. It is not necessary that any person should actually see such exposure if it was made in a public place with the intent that it should be seen, and persons were there who could have seen if they had looked. If it were the law that a man could lewdly

expose his naked person to inmates of two dwelling-houses, as was said in the case of *Reg. v. Holmes*, 6 Cox C. C. 116, "this would not be a country fit to live in if such an abominable outrage could go unpunished." According to the law of this offense the place is a public one if the exposure is such that it is likely to be seen by a number of casual observers. In the case of *Reg. v. Furrell*, 9 Cox C. C. 446, which is an authority relied upon by the defence in the present instance, it was declared that by an indecent exposure in a place not far from a highway the common-law offence had not been committed, but the court was careful to supplement its decision with the remark "that it is not to be taken that we lay down that if the prisoner was seen by one person, but there was evidence that others might have witnessed the offence at the time, we would not uphold the conviction." Sup. Ct., N. J., February, 1884. *Van Houten v. State*. Opinion by Beasley, C. J. (46 N. J. L. 16.)

Evidence—Assault and robbery—Declarations—Res gestæ.—In cases involving personal injury, evidence of declarations of the injured party, touching the cause or circumstances of the injury, made soon after and in close connection with the event, and appearing to grow out of and be dependent upon it, and under such circumstances that they could not reasonably have been contrived for the purposes of the declarant, is admissible as part of the *res gestæ*. The complaining witness was waylaid, knocked down, and robbed in a public street at night. The assailants then fled, and the witness immediately gave the alarm, returned to his house near by, and a few minutes later, on the arrival of a police officer, described to him the appearance of the persons who made the assault. Upon the trial, after the details of the assault and robbing had appeared in evidence, *held*, that the trial court might properly receive proof of the statements of the injured party made to the officer, under the circumstances, as being sufficiently connected with the principal event to be the natural outgrowth of it, and free from the suspicion of plan or after-thought. Upon this subject the authorities are not uniform. Some courts are inclined to hold the rule with much strictness as to the time and circumstances

under which the statements proposed to be shown are made, while others allow a wider range for its application, leaving it to be applied largely in the sound discretion of the trial court. 15 Am. Law Rev. 85; *Com. v. Densmore*, 12 Allen, 537; *People v. Davis*, 56 N. Y. 102; *Com. v. McPike*, 3 Cush. 184; *Insurance Co. v. Mosley*, 8 Wall. 397; *O'Connor v. Railroad Co.*, 27 Minn. 171; S. C., 6 N. W. Rep. 481. Our examination leads us to conclude that especially in cases of tort involving personal injury, the weight of authority in this country is in favor of allowing evidence of the declarations or statements of the injured party, touching the cause or circumstances of the injury, made so soon after the event, and under such circumstances as to warrant the trial court in presuming that they grew out of and were dependent upon it, and could not have been devised or contrived by the declarant for his own purposes. *Insurance Co. v. Mosley*, 8 Wall. 397; *Harriman v. Stowe*, 57 Mo. 93; *Driscoll v. People*, 47 Mich. 416; S. C., 11 N. W. Rep. 221; *Jordan's case*, 25 Grat. 945; *People v. Vernon*, 35 Cal. 51; *Burns v. State*, 61 Ga. 194; *Augusta Factory v. Barnes*, Ga. Sup. Ct. April, 1884. In the last case the party was severely injured while employed in a factory. She was removed to her home, and about one half hour after, while enduring severe bodily suffering, which had continued in the interval, she made a statement to her father of the particulars of the cause of the accident, which the court held proper to be received as part of the *res geste*. In *O'Connor v. Railroad Co.*, 27 Minn. 173; S. C., 6 N. W. Rep. 481, this court after reviewing the cases and in considering this subject generally, say "that a considerable time may elapse and yet the declaration be a part of the *res geste*," and "that each case must depend on its own peculiar circumstances, and be determined by the exercise of sound judicial discretion." In the case at bar the witness had been waylaid and robbed. He had suffered personal violence. A great crime had been committed. He had specially observed and marked his assailants at the time. And while great care and discrimination should be exercised in receiving evidence of this kind, we are unable to say that the court erred in its judgment in this case in admitting the evidence in question. It might

be considered that when the declarant thus described the men who had assaulted him, whom it appeared he had never before seen, his mind was still so occupied and absorbed with his exciting and hazardous experiences as to maintain for so brief a period a close and natural connection between the event and his statements to the officer, and that hence such statements would be the direct and natural outgrowth of the robbery and its concomitants, and they would derive a special credit from that fact (though they would otherwise be hearsay), and would also be relieved from the suspicion of device or afterthought. See Whart. Ev., § 259; 1 Greenl. Ev., § 108. It was clearly competent for the witness to testify that he recognized and identified the same parties the next morning at the police station, and the particulars of such identification were properly received. We see no error or abuse of discretion in the refusal of the court to grant a new trial on the ground of newly discovered evidence. Order affirmed. Sup. Ct. Minn., Oct. 13, 1884. *State v. Horan*, 30 Albany L. J. 20.

Larceny—Description of owner.—In an indictment for larceny, a description of the person from whom the property is alleged to have been stolen, is sufficient, if a name is given by which he is well known, even though his real name is different. Sup. Ct. Cal., March, 1884. *People v. Woods*. Opinion by Ross, J., 3 Pac. Rep. 466.

Partnership—Sale of goodwill—Injunction.—(1) M., a member of a firm at Kalamazoo, and doing business under the name of Kalamazoo Wagon Company, composed of himself, H., L., and L.'s wife, for an adequate consideration purchased of his partners all of their interest "in the property, assets, money, goodwill, and all other property, of every name and nature, in and to the firm of Kalamazoo Wagon Company," and continued the business under the old name. L. and other parties organized a corporation under the name of Kalamazoo Buggy Company, located their place of business in the immediate vicinity of M., and sent out circulars soliciting business, resembling the circulars in use by him, and thus interfered with and injured his business and trade. *Held*, that under the contract of sale M. was entitled to the good-

will of the business purchased; that L. was guilty of a breach of the contract; and that he and the other members of the corporation should be perpetually enjoined from using the name of Kalamazoo Buggy Company, or the circulars resembling those used by M. in the transaction of their business. *Beal v. Chase*, 31 Mich. 490. (2) The decree of the Circuit Court, in addition to enjoining defendants from use of the name of Kalamazoo Buggy Company, and the use of the circulars resembling M.'s circulars, enjoined defendants from receiving mail from the post-office addressed to the Kalamazoo Buggy Company, with a provision requiring M. to deliver to defendants any mail received by him and intended for defendants, or either of them. *Held*, that this part of the decree was erroneous, and could not be sustained. *Myers v. Kalamazoo Buggy Co.*, Supreme Court, Michigan. Opinion by Cooley, C.J. Decided Sept. 23, 1884; 30 Albany L.J. 517.

Copyright—Lecture—Publication—Injunction. The publication by one who had attended lectures delivered orally by an eminent surgeon, of a summary or epitome thereof, under the name of the lecturer, as author of such epitome, will be enjoined. The publication of a book containing the substance of such lectures, however, will not be restrained. *Miller's Appeal*, Supreme Court, Pennsylvania. Decided April 21, 1884; 30 A.L.J. 514.

SALE OR BAILMENT.

It is the glory of the common law, that its "plastic and accommodating nature" lends itself readily to the varying exigencies of modern civilization, yet occasionally, a case arises where it is as difficult to accommodate old principles to new facts as old wine to new bottles. For example: it is at present the universal custom to store grain in "bulk"—that is, to put all grain of like kind and quality in the same bin of an elevator. The convenience of this method is obvious. It greatly economises space, and thereby reduces the expenses of storage. If a special bin were required for every particular bailment, it would be necessary to construct elevators like beehives with an infinite number of cells whose division walls would require as much space as the grain stored. For convenience

and economy, therefore, it is usually agreed that all grain of the same kind and quality shall be mixed together. Receipts are issued to depositors for the number of bushels stored—who become "tenants in common" of the entire mass.* So far, little difficulty is found in determining the mutual rights and obligations of the depositors and warehouseman. The contract is one of bailment. The warehouseman is bound to use reasonable care in the conduct of his house. If loss is suffered without his fault, it falls upon the depositors—who share *pro rata*. A different state of facts may, and in fact, usually does, arise, in the conduct of elevators. Grain is put in at the top of a bin as fast as it is drawn out at the bottom, and it may well happen, that none of the identical grain for which receipts are outstanding, will remain in store. The question now is, upon whom shall a loss fall, in case of damage by fire or inevitable accident? The holder of a receipt urges that none of his grain has been injured. It passed through the elevator and was delivered to other parties. The bailee is bound to replace his property by an equivalent and cannot deliver to him damaged inferior grain. In support of this position, it may be urged that the facts above stated, constitute a sale and not a bailment. They cannot be brought within any definition of bailment, found in the books. "Bailment is a delivery of goods in trust upon a contract express or implied, that the trust should be duly executed, and the goods restored by the bailee." If we add "as delivered to the agent or representative of the bailor,"—the definition is broad enough to cover all disputed ground.†

Where the grain stored has been delivered to any one except the holder of the receipt issued for it, it cannot be returned to the bailor. If done without authority, the grain has been converted; if by permission, the transaction is a sale and not a bailment, for wherever a thing is declared to be accounted

* *Chase v. Washburn*, 1 Ohio St. 244; *Cushing v. Bond*, 14 Allen, 380.

† *Bouv. Dict. Story Bail*, Sec. 2; 2 Black. Com. 395; *Jones on Bail*, 1,117; *Coggs v. Bernard*, 2 Ld. Raym., 917; *Schouler on B.* 2; *Hammond, Lectures on Bail*, 3; 2 Kent, 550.

for in kind or value the property in it passes to the bailee or vendee. In either case where a loss occurs it must fall on the bailee or vendee, for on the one hand he has converted the goods to his own use, on the other, he has the property therein.†

The obvious injustice of such a conclusion, its manifest inconsistency with the intention of the parties and its practical inconvenience have led to its final rejection, notwithstanding the cogency of the argument by which it is sustained. If it had been permitted to prevail, every warehouseman who carried on the business of storing grain, as now conducted, would be an insurer of the grain in his elevator—against all casualties whatsoever, whether or not he contracts to the contrary.

The holder of a receipt would be in no better position than a general creditor of the warehouseman, to the amount of grain deposited. The warehouseman might conduct his business like a bank, and issue certificates of deposit. So long as he keeps on hand grain enough to meet current demands, no one has a right to complain. The statutes of most of the States and the parties themselves contemplated quite a different relation. The holder of a warehouse receipt is presumed to be the owner of goods actually in store, if not of the identical goods originally deposited, yet goods of an equivalent amount of equal quality, by which they have been replaced. No one would be more ready to proclaim this theory of right than the holder of the receipt himself, where he is brought into conflict with a general creditor of a warehouseman, although he might be reluctant to confess it, if the elevator and contents were destroyed by fire or inevitable accident. The courts have cured the anomaly by confessing it. The contract more nearly resembles a bailment than a sale; ac-

cordingly the principles of right applicable to bailments determine the rights of the parties. Where, therefore, grain is stored in an elevator, with the understanding that it may be mixed with and accounted for in other grain of like quality and kind, the transaction is a bailment and not a sale, definitions to the contrary notwithstanding.†—*I. L. Lionberger in Central Law Journal.*

§ *Nelson v. Bronen*, 44 Iowa 455; *Nelson v. Brown*, 53 Iowa, 555; *Chase v. Washburn*, 1 Ohio St. 244; *German Bank v. Meadowcroft*, 4 Brad. 636; *Ledyard v. Hibbard*, 14 Rep. 213; *Dove v. Ekstrom*, 1 McCrary 434; *Greenleaf v. Daws*, 3 McCrary 21; *Young v. Miles*, 20 Wis. 615.

GENERAL NOTES.

"*Grip*" sends out with its Christmas number a beautifully executed coloured portrait of the Canadian Premier in the official robes of his latest dignity. The picture has considerable artistic merit.

Lord Bacon, in his paper on the "Amendment of the Common Law," wrote:—"Great judges are unfit persons to be reporters; for they have either too little leisure or too much authority, as may appear well by those two books, whereof that of my Lord Dyer is but a kind of note-book, and those of my Lord Coke hold too much *de proprio*."

In *Nash v. Battersby*, 2 Ld. Raym. 986 and 6 Mod. 80, the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurred, and it was ill; for, said the Court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

The late John Rea, of Belfast, who defended Mr. Biggar, M. P., at Sligo, did not entertain the highest opinion of magisterial wisdom. In the course of an interminable speech before a local stipendiary, he was interrupted with the remark, "You may speak till midnight, Mr. Rea, but I assure you all you say simply enters into one of my ears and goes out of the other." To which Mr. Rea retorted, "I have always been distressed by the suspicion that there is nothing between your worship's ears to intercept anything!"

The Baltimore & Ohio Railroad Co., a corporation having its home office in Baltimore city, in the State of Maryland, leased and operated several lines of railroad in the State of Virginia, using its own rolling stock. A portion of this stock was seized by officers of latter State in an effort made by it to enforce the payment of a tax levied thereon. The B. & O. R. R. Co. obtained an order restraining the sale, and, on motion to dissolve this order, the Court held that the rolling stock was personal property and as such was liable to taxation at the home office of the corporation, and in the absence of legislation on the subject was not liable to taxation in Virginia or elsewhere.—(*Baltimore & Ohio R. R. v. S. Brown Allen et al.*, U. S. Dis. Ct. of Va.)—*Boston Law Record.*

† *Chase v. Washburn*, 1 Ohio St. 244; *Richardson v. Olmstead*, 74 Ill. 213. See civil law Mutuum Inst. lib. 3 tit. 15, Dig. lib. 44 tit. 9. Pothier Pand. lib. 12, tit. 1 Nos. 9 and 10; Jones on Bailment, 64-102, etc. *Johnston v. Browne*, 39 Iowa 200; *Norton v. Woodruff*, 2 Comst. 155; *Smith v. Clarke*, 21 Wend. 84; *Hurd v. West*, 7 Cow. 752; *Baker v. Roberts*, 8 Greenl. 101; *Ewing v. French*, 1 Blackf. 354; *Wilson v. Cooper*, 10 Iowa 565; *Ruffman v. Merry*, 3 Mason, 478; 3 Kent Com. 589; *Story on Bail*, 193; 7 N. Y. 433; *Bronen v. Hitchcock*, 28 Vt. 452; *Richardson v. Olmstead*, 74 Ill. 213; *Mallory v. Willis*, 4 Comst. 77, 85; *Pitice v. Schenck*, 8 Hall, 28; *Carlisle v. Wallace*, 12 Ind. 252; *Dickson v. Cass Co.* etc. 42 Iowa, 38.

The Legal News.

VOL. VIII. JANUARY 17, 1885. No. 3.

The Supreme Court of Canada, on the 12th instant, pronounced the Dominion License Act of 1883, known as the McCarthy Act, to be *ultra vires* as regards the regulation of retail licenses. This decision, which was given upon the reference provided for by the Act of last session, is based, apparently, upon the judgment of the Privy Council, in *Hodge v. Reg.* (7 L.N. 18.) The history of the matter is briefly this: When the decision of the Privy Council in *Russell v. Reg.* (5 L.N. 25, 33) was pronounced, it was supposed to be conclusive authority for assuming that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the Provincial Legislatures. The McCarthy Act of 1883 was thereupon enacted by the Parliament of Canada. When the case of *Hodge v. Reg.* was carried to the Privy Council, their lordships disavowed the interpretation which had been placed upon their previous decision. The judgment in the *Hodge* case says (7 L.N. 23): "Their lordships consider that the powers intended to be conferred by the Act in question (the Ontario Act of 1877) when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament." The effect of this decision was to make it doubtful whether the Parliament of Canada had not legislated *ultra vires* in passing the McCarthy Act, and the Supreme Court, on special reference, now holds that the Act is in effect *ultra vires*, except so far as relates to the licensing of vessels and wholesale licenses, and also, except so far as relates to the carrying into effect of the provisions of the Canada Temperance Act of 1878.

Among other decisions of the Supreme Court rendered on the same day are the following:—*Morse v. Martin*, (5 L.N. 99), appeal of plaintiff dismissed with costs; *Sulte v. City of Three Rivers*, (5 L.N. 330), appeal dismissed with costs; *Charlebois et al. & Charlebois*, and *Charlebois & Charlebois*, (5 L.N. 421), appeal in each case dismissed; *Gingras & Symes*, (7 L.N. 126) appeal dismissed; *City of Montreal & Hall*, (6 L.N. 155), appeal dismissed; *Stevens & Fisk*, (6 L.N. 329), judgment reversed; *Chollette & Bain*, (7 L.N. 220), judgment reversed, and election annulled.

We are pleased to notice that Canadian decisions are read with care in Missouri. Our learned contemporary the *American Law Review*, not only examines the questions decided but, apparently, has leisure to detect typographical errors. He has discovered a misprint which occurs in a reference in a Quebec report published some ten years ago; but oddly enough, our contemporary in correcting this error, himself misprints the title of the case, and changes "*Dansereau*" to "*Dause-reau*." The learned critic, therefore, hardly commends himself to the office of proof reader.

There is some pertinence in the following remarks of the *Law Journal* (London):—"Perhaps the worst of the evils of a Court of Appeal in arrear, is that the judges work under pressure. Lord Justice Bowen, a short time since, appealed to the bar to co-operate with the judges in clearing the list by shortening their arguments. We are sorry for the necessity for this request, because so soon as a Court of Appeal begins in any way to hurry its work, so soon does it begin to be inefficient as a Court of Appeal. A Court of Appeal ought to hear everything which can be said. Assistance might be rendered by succinctness of argument, but harm rather than good would be done by omitting anything."

Mr. Justice Papineau, on the 17th instant, in *Exchange Bank v. Burland*, decided that shareholders who are depositors cannot offset their deposits against double liability calls by the liquidators. There are so many persons interested in this decision, that we print the text of the judgment in the present issue.

COURT OF QUEEN'S BENCH.

QUEBEC, Dec. 6, 1884.

Before DORION, C. J., MONK, RAMSAY, CROSS
and BABY, JJ.

LA CORPORATION DE LA CITÉ DE QUÉBEC, Ap-
pellant, and PICHÉ, Respondent.

Illegal arrest—Damages—Probable cause.

Held, 1. That where a corporation is sued for illegal arrest by its officer, it is sufficient for the defendant to show that the officer had probable cause.

2. Where a person not licensed to sell was arrested while writing down orders for the house which he represented, that the police officer had probable cause for the arrest, under a by-law of the corporation forbidding to sell without license.

RAMSAY, J. This is an action of damages for illegal arrest. It is objected on the part of the corporation that neither by their servants nor by any act of theirs was the respondent arrested; that the sergeant who made the arrest was not their officer, but that he acted under the law, or what he conceived to be the law, and that he alone is responsible. The whole nature of the case contradicts this pretention. Piché was arrested under a by-law of the corporation, and he was held a prisoner not until he was punished for an infraction of the law, but until he was induced to satisfy the corporation by taking out a license. In fact the cost of a license was extracted from him under duress by the corporation, and he was then set at liberty by order of one of the council. It seems, too, that the mayor set the policeman on to the work—"il n'a pas ordonné l'arrestation, il a seulement attiré l'attention de la police sur un fait dont il avait été informé." It seems then to be not only an unreasonable pretext, but one highly imprudent for the corporation to urge.

The next point is as to the form of the judgment. It enters into no detail as to what constitutes the damages, except that the sum of \$150 to be paid to respondent was "as and for damages in the premises," "for the causes stated in the declaration." It is then simply a condemnation for the damages the respondent had suffered.

The only questions then that remain are as to the legality of the arrest. Respondent does not contest the validity of the by-law or the authority to make it; but he says, I was not within its terms. He says, I was not selling and the by-law forbids me "to sell," offering to sell is harmless. It is also contended that he had no authority to sell or even to offer to sell; that as a commercial traveller he could only be liable for selling by sample, and that in fact he did none of these things. It seems to me that it is unnecessary for the merits of the present suit to decide these fine distinctions. It is not necessary that respondent should have been guilty, but that his acts were of such a nature as to give the sergeant, acting honestly in the discharge of his duty, probable cause for the arrest. He was arrested as he was writing down orders in the book from Mr. Parent, on the house which Mr. Piché represented. It seems to me that this was probable cause under the statute and by-law, and that it left only a legal question to be decided, about which the constable knew nothing. He is therefore protected, and consequently his act cannot be a tort by the corporation.

Judgment reversed.

SUPERIOR COURT.

MONTREAL, Jan. 17, 1885.

Before PAPINEAU, J.

THE EXCHANGE BANK OF CANADA V. BURLAND.

Bank in liquidation—Action by liquidators for calls—Rights of depositors.

Held, that a depositor who is also a shareholder of a bank in liquidation under the Banking Act and which was insolvent when it suspended payment, is not entitled to offer the amount of his deposit in compensation of calls made upon his stock by the liquidators under the double liability clause of the Banking Act, Sect. 58 of 34 Vict. cap. 5.

The judgment explains the case:—

"Considérant que les liquidateurs nommés en vertu de la 45^e Vict., ch. 23, pour liquider les affaires de la Banque demanderesse poursuivent, au nom de celle-ci en vertu de l'autorité qui leur est conféré sous le même statut, le défendeur en sa qualité d'actionnaire

dans le fonds-capital de la dite banque, en recouvrement de quatre versements appelés suivant la loi, exigibles de lui en vertu de la 58e section du statut 34 Vict., ch. 5 ;

“ Considérant que le défendeur plaide qu'à la date de la suspension de paiement par la dite banque le 15 de septembre 1883, il était créancier de celle-ci d'une somme de \$6,623.04, montant d'argent par lui déposé antérieurement, avec droit de retirer le tout ou partie, à sa volonté, sur présentation de ses chèques, et qu'il a droit d'offrir en compensation et qu'il a offert en compensation des dits versements appelés ses chèques à prendre à même le montant du dit dépôt, pour rencontrer et payer les dits versements, et que les liquidateurs ont même accepté son chèque pour le premier des dits versements et lui en ont donné un reçu qu'il a produit avec son plaidoyer ;

“ Considérant que les demandeurs ont répondu que le reçu en question avait été donné par erreur de droit et sans autorisation de la cour, et que la créance du défendeur ne pouvait pas compenser sa dette ;

“ Considérant qu'il est prouvé que la dite banque a suspendu paiement le quinze de septembre 1883, qu'elle n'a pas été capable de reprendre paiement dans les quatre-vingt-dix jours suivant ni depuis, qu'elle était en faillite, et qu'elle a été mise en liquidation par jugement de cette cour en date du 5 de décembre 1883 ;

“ Considérant qu'en vertu des sections 20 et 21 du dit statut, 45 Vict., ch. 23, le défendeur, à compter de la date du dit jugement de mise en liquidation, n'avait plus le droit d'exiger le paiement de sa dite créance si ce n'est concurremment avec tous les autres créanciers de la banque ;

“ Considérant que la créance du défendeur, par le fait de la faillite de la banque, est devenue sujette à réduction, au marc la livre, comme toutes les autres créances contre la banque ;

“ Considérant que le défendeur n'a pas mis en question par sa défense la légalité des appels de versements faits par les liquidateurs ;

“ Considérant que les versements réclamés par la présente poursuite sont exigibles immédiatement et intégralement à tel point que

tout défaut, par le défendeur ou tout autre actionnaire, de satisfaire à ces demandes de fonds, dans le temps voulu par la loi, peut entraîner la déchéance de leur droit à aucune partie de l'actif de la banque, et que ces versements doivent être demandés pour satisfaire à toutes les dettes et engagements de la banque, sans attendre la perception des créances qui lui sont dues, ou la vente d'aucun de ses biens ou de son actif ;

“ Considérant que la créance poursuivie et la créance offerte en compensation ne sont pas également exigibles et au même temps, et qu'elles ne peuvent pas être compensées l'une par l'autre ;

“ Considérant que sous ces circonstances le reçu donné par les liquidateurs au défendeur, pour le premier versement réclamé n'aurait pas dû être donné et pourrait causer du préjudice aux autres créanciers de la banque si le montant entier en était crédité à présent, au défendeur, de même que si le montant de son dépôt était présentement employé à compenser les autres versements, et que cela serait contraire à l'esprit comme à la lettre de la loi ;

“ La Cour renvoie les défenses du défendeur comme mal fondées en droit comme en fait, et condamne en conséquence le défendeur à payer à la demanderesse la dite somme de \$3,500 avec intérêt sur \$500 à compter du 31 de mai 1884, sur \$1,000 à compter du 30 de juin 1884, sur \$1,000 à compter du 30 de juillet 1884, jour de l'échéance respective des dits versements, le tout avec dépens,” etc.

Judgment for plaintiff.

Greenshields, McCorkill & Guerin for the plaintiff

Bethune & Bethune for the defendant.

COUR DE CIRCUIT.

MONTREAL, 29 décembre 1884.

Coram MOUSSEAU, J.

PERRIER et al. v. MARY QUINN.

*Assumpsit pour épicerie—Marchande publique
—Renonciation à communauté—Maitresse
de pension.*

JUGÉ : 1. *Qu'une maitresse de pension est une marchande publique.*

2. *Que la femme marchande publique ne pour-*

rait se dégager de son obligation personnelle même en renonçant à la communauté, sauf le recours contre son mari ou sa succession. Elle est alors dans le cas d'une femme qui a souscrit une obligation avec l'autorisation du mari.

Les demandeurs réclament de la défenderesse la somme de \$18.52, pour des épiceries achetées par cette dernière du vivant de son mari. Elle tenait une maison de pension et son mari vivait avec elle. A la mort du mari, la défenderesse renonça à la communauté de biens. Poursuivie, elle plaida que la dette en était une de la communauté, et qu'ayant renoncé elle n'était pas tenue de payer. Elle invoquait les articles 1382 et 2186 du code civil. Les demandeurs répondirent qu'elle était responsable comme marchande publique en vertu de l'article 179. Voir aussi Rogron sur art. 220; Toullier, vol. 12, Nos. 241, 244; Abbott, Acte de faillite de 1864, p. 6 et suiv.: c. 21, art. 220.

Jugement pour les demandeurs.

Edmond Lareau, avocat des demandeurs.

Judah, Branchaud & Beauset, pour la défenderesse.

(J. J. B.)

COURT OF APPEAL

LONDON, Dec. 18, 1884.

BRETT, M.R.; COTTON, L.J.; LINDLEY, L.J.

WELDON V. DE BATHE.

(Law J. Notes of Cases.)

Married Women's Property Acts, 1870, 1882—Trespass to Separate Property of Married Woman—Right to enter as Servant of Husband.

Appeal by the plaintiff from the Queen's Bench Division.

The plaintiff, a married woman, living in a house without her husband, brought an action for trespass by entering the house which she alleged was bought with her own money, the produce of her own industry. The defendant alleged that he entered the house by the authority of her husband. The Queen's Bench Division, on the point of law being argued, gave judgment for the defendant, and ordered that part of the claim to be struck out.

The plaintiff appealed.

Their LORDSHIPS allowed the appeal, holding that the plaintiff was entitled to maintain the action, for that in the circumstances of the case the husband could not authorise the defendant to enter the house of the plaintiff against her will, as it was her separate property under the Married Women's Property Act, 1870.

HIGH COURT OF JUSTICE.

LONDON, Nov. 29, 1884.

Crown Case Reserved.

REGINA V. BUTT.

(Law J. Notes of Cases.)

Falsification of Accounts.

This was a case reserved by the deputy recorder of Poole for the consideration of the Court of Crown Cases Reserved, and raised the question whether the prisoner was guilty of an offence under the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24). The case was stated by the deputy recorder in the following terms:—

The prisoner was tried before me at the Midsummer Quarter Sessions for the borough of Poole, on July 5, 1884, on an indictment framed on section 1 of the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24) (A.) The evidence was that the prisoner, who was employed as a clerk and traveller by J. J. Norton, at Poole, collected on February 22 a sum of £8 14s 10d, which was due to his employer from W. Sheppard, of Bournemouth, for which he gave him a receipt, which was produced at the trial. On his return to Poole the same evening he went to his employer's office, and, according to custom, rendered an account of the money he had received during the day to Mr. Norton's cash clerk, a man named Elford. The prisoner wrote out on a slip of paper (which was produced) various sums he had received, but instead of putting down the £8 14s 10d which he had had from Sheppard, he wrote "Sheppard on account £5." Elford said that he then innocently either copied this sum from the prisoner's memorandum, or that the prisoner read it out to him from the memorandum, he could not remember which, into

Mr. Norton's cash-book, in which consequently there appeared the false entry, "W. Sheppard, £5," instead of, as it should have been, an entry of a payment by Sheppard of £8 14s 10d. The cash book, with this entry in it, was produced at the trial. At the time when he delivered the memorandum or read its contents out to Elford, the prisoner knew that in the ordinary course of business the items as communicated by him would be entered in his employer's books. At the close of the case for the prosecution the prisoner's counsel submitted that I ought not to leave the case to the jury, as no offence had been committed by the prisoner within the terms of the statute. I held that the case came within the statute, but agreed to reserve the point for the consideration of this Court. I accordingly left the case to the jury, directing them that the prisoner himself would be guilty of making a false entry in Mr. Norton's cash book if he, with intent to defraud, gave Elford, who was an innocent agent in the matter, the memorandum to copy into the cash book, or read its contents out to him for that purpose. The jury found the prisoner guilty. I respited judgment, and admitted him to bail, to come up for judgment at the next sessions. The question for the consideration of the Court is, whether the prisoner committed an offence within the above statute. If he did not, then the conviction to be quashed, otherwise the conviction to stand.

Charles Mathews, for the prisoner: These facts do not show that there was any false entry in the cash book. The book was not kept for the purpose of showing the transaction between the prisoner and Sheppard, but between the prisoner and Elford, for the purpose of showing the amount for which Elford was responsible to the prisoner, consequently it was a correct entry as between the prisoner and Elford. Further, the prisoner did not make a false entry within the meaning of the Falsification of Accounts Act (38 & 39 Vict. c. 24),* as the entry was

not made by him, nor was it made in a book over which he had control. Neither did he "concur in making" a false entry, as the word "concurrence" implies agreement, and there was no concurrence on the part of Elford to make a false entry. The Act did not contemplate an entry on false information, otherwise a collector in Manchester telegraphing to his firm in London could be held guilty of making a false entry if he telegraphed false information which he knew would be entered in a book.

No counsel appeared in support of the conviction.

LORD COLERIDGE, C.J.: I am of opinion that the case is perfectly clear, and that, upon the facts, the prisoner made, or concurred in making, a false entry in a book of his employer within the terms of 38 & 39 Vict. c. 24. His duty was to render to the cash clerk an account of the sums he had received for his employer, and, having received a sum of £8, he, in sending his account to the cash clerk, wrote on a slip of paper £5. This piece of paper he either gave to the clerk or read out, and consequently the clerk entered the smaller sum in the cash book. That was a false entry in the ordinary sense of the word. The prisoner falsely read out the sum he had received from Sheppard, and with making that entry the prisoner had something to do—he either made it or concurred in making it. It has been contended that the statute was not broken, because the person making the entry did not know it to be false, and the person who knew it to be false did not make the entry, but, at all events, this entry was false so far as it purported to be an account of Sheppard's payment. It purported to represent a receipt from a person making a payment to the prisoner's employer, and the prisoner either made the false entry by the innocent hands of Elford or else he concurred

writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, &c.

* If any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully, and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper,

in making it. The conviction, therefore, is right, and must be affirmed.

GROVE, J., HUDDLESTON, B., MANISTY, J., and MATHEW, J., concurred.

THE NEW DIVORCE LAW IN FRANCE.

During the dark and the middle ages, and until the great social and political cataclysm of 1789, France, like all other Catholic countries, had no laws bearing upon divorce. Marriage not being regarded as a civil contract, could not be dissolved by any temporal power. The Pope alone had the power, not to decree a divorce, but to declare a marriage null and void *ab initio*.

This, with other beliefs and convictions consecrated by religion and time, was swept away by the revolutionary torrent of 1789.

Marriage, instead of a religious sacrament, was declared to be a civil contract; and in 1792 the first divorce law was passed. As might be supposed, in that era of lax morality, every facility was offered by the law for severing the marriage tie. In addition to all the more or less grave causes recognized by modern jurisprudence in the United States, divorces were granted for incompatibility of character, and by mutual consent. As the formalities necessary to obtain a divorce by mutual consent were of the extreme simplicity, and as in the case of incompatibility of character, a mere allegation by one of the parties was sufficient proof upon which to base a decree, divorces became excessively numerous, and the law was the occasion of scandalous abuses, and a quasi-authorized immorality.

When Napoleon had succeeded in consolidating his power upon an apparently solid basis, and when the revolutionary elements had been again relegated to the Faubourgs, and society had become re-organized, the necessity for a new divorce law became universally felt.

On the 31st March, 1803, a law on divorce was promulgated, on the whole moderate and just, the determining causes of which were maintained in the case of a limited divorce (*séparation de corps et de biens*), when in 1816 the divorce law itself was abrogated, and which, with some modifications, has been

re-enacted by the law of the 19th of July, 1884.

By the law of 1803 divorce was granted for the following causes:

1st. Adultery of the wife.

2nd. Adultery of the husband, when he introduced a concubine in the conjugal domicile.

3rd. Condemnation of either party of an infamous crime.

4th. Excesses, violence and extreme cruelty and injury.

5th. Mutual consent.

The last ground for a divorce was a concession to the supporters of the law of 1792, and the more radical element of the populace, but it was so hampered and restricted by the procedure to be followed, that in practice it was very difficult to accomplish.

The re-establishment of the monarchy necessarily led to the abrogation of the law upon divorce, and for more than sixty years no serious or lasting effort was made to revive it. Six years ago, however, M. Naquet began his active and energetic propaganda, and in spite of rebuffs, ridicule and the most strenuous opposition, persistently carried out his purpose, and on the 19th of July, 1884, the new divorce law was voted.

It is little more than the re-enactment of the divorce law of 1803, but there are two salient features in the new law, one of which evinces the higher esteem and respect accorded to women in France in the present age, and the tendency to constrain men to the same marital obligations and duties as women. The second ground upon which divorce may be obtained is simply for the adultery of the husband, the restriction when he keeps a concubine in the conjugal domicile being abrogated.

The clause authorizing divorce by mutual consent is also abolished, and in its stead the following new clause is inserted:

"When the divorce *a mensa et a thoro* (*séparation de corps et de biens*) shall have existed for three years, the judgment decreeing such separation may be converted into a judgment for an absolute divorce."

These are the only changes made by the new law. It is open to objections in many respects, and it is questionable whether all of

its provisions will be sustained. It is not the law projected by Naquet or voted by the Chambre, but as modified, curtailed and restored by the Conservative Senate.

The clauses most condemned are the second, which may be re-established as in the law of 1803, and the facultative portion of the last clause, giving judges the option whether or not to convert the decree for a *séparation de corps et de biens* into one of absolute divorce. This will probably be made obligatory.

The re-establishment of clause 2 as in the text of the old law is not so absolutely prejudicial to the wife as would at first appear. For while under that law clause 2 gave her no right to demand a divorce for the simple infidelity of her husband, yet it could be obtained under clause 3 for "grievous injury." Although the granting this was left to the discretion of the judge, divorce was usually accorded on the ground that marital infidelity on the part of the husband was a "grievous injury" to the wife.

Indeed this 3rd clause had a general and saving effect, for it was applied in cases where clause 4 was not effectively, but morally true; as although a wife could not obtain a divorce for a mere misdemeanour, yet if the misdemeanour evinced moral degradation or turpitude, it would be considered a grievous injury, and a divorce granted on this ground.

The facility with which a *séparation de corps et de biens*, or a limited divorce, may be converted, under the new clause in the recent divorce law, into an absolute divorce on a *mere ex parte* motion, is not the radical change it would appear to Americans, for a limited divorce in France is not a palliative for an absolute divorce, as in New York and elsewhere, granted for causes insufficient to sustain an application for an absolute divorce, but is decreed for identically the same causes. In the law of 1803 it was made co-existent with an absolute divorce, as a concession to the conservative and religious element of the people who regarded marriage as an indissoluble sacrament.

The procedure under the new divorce law is purposely complicated and slow; the ob-

ject being that parties to a divorce suit shall have sufficient leisure and opportunity to reflect upon the gravity of the steps they propose to take, and the serious nature of the bond they wish to dissolve. More than this, the judicial authority, which in France is much more extended than with us, and has a *quasi* paternal or patriarchal character, twice intervenes, and the judge *in camera*, having cited the parties to appear in person before him, admonishes and endeavours to reconcile them.

The libel or complaint of the plaintiff, which in France is a simple statement, devoid of the technicalities inherent to such papers with us, is presented by him in person to the judge, and explained and discussed. Should the statement appear sufficiently well founded to warrant a divorce suit, and should the plaintiff remain obdurate to the perfunctory administration of the judge, the latter issues a citation to the defendant, as well as the plaintiff, to appear before him *in camera*. Here he uses his endeavours to reconcile the parties, going through the patriarchal comedy for a second time. Should it prove unsuccessful, and the plaintiff persist in his purpose, which he very naturally does (not having begun his suit for the mere pleasure of being lectured by the judge), his statement, and the papers in support thereof, are transmitted by the judge to the attorney-general (or district attorney [*procureur-général*]) (who is always a party to a divorce suit) and the court, the presiding judge of which, after hearing the attorney-general, either accords or refuses to plaintiff the permission to issue a summons. Here then commences the suit proper, the procedure of which may be divided into two phases, the private and the public.

The parties, as previously, appear before a judge *in camera*, but this time accompanied by their respective counsel, who state the grounds upon which their clients demand or oppose a divorce, mentioning the proofs they possess and the witnesses they intend to subpoena. Discussions between the parties naturally ensue, and objections are made to the proofs offered and the witnesses to be cited; all of which, with such further observations as the parties may choose to make,

are duly recorded by the clerk and signed by the parties.

This ends the proceedings *in camera*, which still partake of the patriarchal character, so inherent in French jurisprudence, which goes upon the assumption that the people at large are children, and ought to be treated as such.

The procès-verbal or statement thus signed is submitted to the court, which decides whether or not the petition for a divorce is admissible. Of course in the latter case the suit is dismissed, and the only remedy for the plaintiff is to appeal against the interlocutory judgment.

If, however, the libel or petition is admissible, the public and regular procedure commences.

Here the peculiar features incident to French divorce suits end, and the subsequent procedure is necessarily similar in its general characteristics to that of divorce suits in our own States.

The judgment, however, when rendered by the court does not *per se* dissolve the marriage. Thé law requires that the dissolution should be publicly pronounced by the civil officer (usually the mayor) of the domicile of the plaintiff.

The consequences resulting from a divorce are necessarily, on account of the subordinate position of the wife during marriage and the vested rights which children have in their parents' property, more serious and extensive than in the United States or England.

The marital power and authority accorded by the Code to the husband is destroyed, and the woman resumes her position and rights as a *feme sole*. Both parties have the privilege of re-marrying, with the exception that the party convicted of adultery cannot marry his or her accomplice, and the restriction that a woman cannot marry until ten months shall have elapsed since the judgment of divorce.

Should the children issue of the marriage be minors, they are entrusted to the care of the party in whose favor the divorce has been pronounced, unless a specific decree of the court order otherwise (C. C. 302.)

The right of the children to maintenance,

education, and the share accorded them in the estate of their father and mother by the Code, subsist and are unchanged by a divorce pronounced between their parents. As to the parties themselves, the property relations existing between them may be modified. Articles 299 and 300, C.C., deprive the party against whom the divorce has been pronounced of all privileges and advantages (from a pecuniary point of view) which he or she had acquired by marriage settlements, or gifts made during the marriage, whereas the party in whose favor the divorce was pronounced is entitled to all the benefits and advantages acquired by marriage settlements or otherwise, even though the stipulation existed that such benefits and advantages should be reciprocal.—*N. M. Grinnell in Albany Law J.*

GENERAL NOTES.

The desks used by the Queen's Counsel in the Chancery Courts in the Royal Courts are being made level, instead of sloping, as hitherto.

Mr. Justice Rainville, who, as the bar are aware, has suffered from ill health since the Long Vacation and has been unable to perform any judicial duty, recently returned to the city with health much improved. His Honor is about to pay a visit to Europe before resuming his judicial functions.

Mr. Justice Fry relieves his mind very freely in the late case of *Lyell v. Kennedy*, Chancery Division. "I have rarely come across a case," he says, "in which greater folly has been shown than that which has been manifested in the way in which this case has been conducted. There has been a competition of demerits on both sides; each has striven to use the practice and forms of the Court to the utmost for the purpose of aggravating and annoying the other, and they have each been successful to a considerable extent, and the result has been a most incredible waste of money, which will have ultimately to be borne by one or other, or both of the parties."

Mr. Edmund Yates' appeal has been dismissed, and he has been consigned to Holloway prison, to undergo his sentence of four months' imprisonment for libel (7 L. N. 137.) A telegram, dated London, Jan. 19, says:—"Orders to the governor of Holloway prison took effect to-day in regard to Edmund Yates, the celebrated society editor. He is put on an allowance of half a pint of wine or one of malt liquor a day. Visits from friends must be arranged by the visiting magistrates, and he can receive only one newspaper daily. His letters will be regulated by the governor's orders. He is to take exercise by himself in the first-class mis-demeanants' ground, to rise at half-past six and retire at a quarter past nine. Rules may be relaxed by the medical authorities if his health suffers from the prison treatment."

The Legal News.

VOL. VIII. JANUARY 24, 1885. No. 4.

It has been proposed to place an elevator in the Montreal Court-House, and provide the accommodation so urgently needed by constructing an additional floor. When this suggestion was made at a recent meeting, it was doubted by some one present whether there was any precedent for such an arrangement. It was answered, however, that elevators are in common use in the court-houses of other large cities, and we notice in a late issue of the *Boston Law Record* that it is proposed to put one in the court-house of that city. S. J. Thomas writes to the Mayor of Boston:—"If you will somehow cause to be put into the court-house a couple of elevators I am sure that not only the judges and clerks and jurors and parties and their witnesses, including the cripples and those afflicted with heart disease or asthma or other trouble which makes it difficult for them to climb, but who are nevertheless constrained to attend court, but also the lawyers, some of whom, believe me, are neither cripples, nor yet especially infirm, and whose hearts are in the right place, will thank you and hold you in everlasting remembrance as the doer of another sensible act. Please to regard this as a very earnest petition." The Mayor replies: "I heartily approve of your suggestion that elevators be provided for the present court-house."

One would expect to learn that prohibition or enforced temperance diminishes wife murders, criminal assaults, and offences of this nature. But the actual volume of crime is apparently affected in a much less degree than the advocates of prohibition pretend. For example, according to the last report of the directors and warden of the Kansas Penitentiary, crime reached a higher mark while prohibition was most effective in that State. It shows that from counties where the sale of liquors was not interfered with "have come a less number of convicts, according to their population, than from many of the counties

where the enforcement of the law (prohibition) was most rigid and complete." Thus four counties with no liquor law and a population of 117,239 supplied 95 convicts, while six counties with a rigidly enforced law and a population of 115,865 supplied 111 convicts: or, to adopt the language of the report, "from a prohibition population of 115,865 come 16 more convicts than from an anti-prohibition population of 117,239."

Mr. Justice Paxson recently gave judgment, in the Pennsylvania Supreme Court, in a suit brought before the civil war by Asa Packer against his partners for an account. The judge begins an opinion, which occupies nearly fifty pages of the Pennsylvania reports, with this explanation:—"It is now over twenty-six years since this proceeding was commenced in the court below. During that time the three principal parties and several of the eminent counsel concerned in the cause have been removed by death. The paper books, Master's report, the arguments before the Master, the testimony and exhibits occupy twelve printed volumes. It was stated in the argument at Bar that the expenses of the litigation when it reached this court had amounted to over one million dollars. It involves many millions more. I mention these circumstances merely by way of apology for consuming nearly the whole of my summer vacation with the examination and study of the case."

Women who are sensitive and coy as to their age, says the *N. Y. Herald*, will learn with interest that this common vanity of their sex has a time-honored origin. In one of the Year Books of the reign of Edward III. is reported a decision in which Judge Barnard makes this remark: "There is no man in England who can rightly tell if a woman has reached her majority or not; for many women who are at least thirty years old want to appear as but sixteen." This was in 1377—more than five centuries ago. It shows that in one respect at least the average female mind was the same then as now.

The Court of Appeal, in the judgment rendered on the 23rd inst., stands three to two on the question of the validity of the tax im-

posed on corporations by 45 Vict. (Quebec) Cap. 22. Justices Ramsay, Tessier and Baby hold the Act to be *intra vires*, while the Chief Justice and Mr. Justice Cross dissent. The result is that the judgment of Mr. Justice Rainville in *Lamb v. The Ontario Bank*, 6 Legal News, p. 158, is reversed, and that of Mr. Justice Jetté in *Lamb v. North British & Mercantile Ins. Co.*, 7 Legal News, p. 171; M.L.R., 1 S.C. 32, is affirmed. The cases are to be taken to the Privy Council.

THE ORDER OF BUSINESS IN THE COURT OF APPEAL.

It is important that the attention of advocates practising in the Court of Appeal at Montreal should be directed to the fact that the Court, on the 16th instant, resolved to adhere strictly in future to the rule, that causes on the list for the day must be proceeded with, or lose their turn. It does not appear to be generally understood that cases should not be allowed to go upon the list for the day unless the parties are actually ready to proceed. The fact is that two or three cases are sometimes called, in which the Court is asked to suspend the hearing for twenty-four hours or longer; then the next cases are called, and the counsel, who had not anticipated such an early summons, are found to be absent. Thus, during the present term, on the 16th instant, several cases were called in which one of the counsel was detained elsewhere, being engaged in the examinations for the bar. The hearing was suspended by special request. The consequence was that the remaining cases on the list for the day were reached sooner than had been expected, and the counsel were either not in attendance, or were otherwise unprepared. This led to a conversation to the following effect:—

The CHIEF JUSTICE.—In future no case on the roll for the day will be continued with my consent. If counsel are not ready their cases will be put to the foot of the list. The practice of fixing five or six cases for each day was intended to give the bar an opportunity of arranging the time of argument to suit their convenience, but it appears that they won't even take the trouble to ascertain whether their cases will come on.

Mr. Justice CROSS.—The practice of having a list for the day, which was adopted for the convenience of the bar, has become rather embarrassing to the Court.

The CHIEF JUSTICE.—If the bar want to do away with the rule of putting five or six cases for each day it is easy to rescind it, and the roll will then be called over until there is a case in which the parties are ready to proceed.

Mr. KERR, Q. C.—On the part of the bar I would say that if the rule were positively fixed that cases would not be suspended, it would probably be observed.

Mr. Justice RAMSAY.—I admit that there is too much good nature on the part of the bench; I quite admit that.

The CHIEF JUSTICE.—The majority of the members of the bar show by their acts that they do not hold with what you say, Mr. Kerr, because nearly all the members of the bar have, at various times, made applications of this kind.

Mr. KERR.—I do not think I have made such an application.

The CHIEF JUSTICE.—Perhaps not you, but nearly all the lawyers pleading here have at one time or other asked for suspensions.

The calling of the list was then resumed, and a case in which Mr. Kerr was counsel being reached, the learned counsel stated that as it was a long way down on the roll he had not anticipated that it would be reached for a few days, and his factum was not filed.

The CHIEF JUSTICE.—You see you are driven to say that your factum is not ready in time, because three or four cases which should have come on have been passed over.

An adjournment then became necessary before the hour of 12.

THE DOMINION LICENSE ACT.

The following is the text of the report of the Supreme Court to the Dominion Government in answer to the questions submitted in connection with the Dominion License Act:—

IN THE SUPREME COURT.

MONDAY, the 12th Jan., 1885.

Present:—

The Hon. Sir William Johnstone Ritchie,
Knight, Chief Justice.

The Hon. Samuel Henry Strong, J.
 " " Telephore Fournier, J.
 " " William Alexander Henry, J.
 " " Henri Elzear Taschereau, J.

A special case containing the following questions having been referred by His Excellency the Governor-General in Council to the Supreme Court of Canada for hearing and determination, in pursuance of the provisions of the 26th section of 47th Victoria, chapter 32, intituled, "An Act to Amend the Liquor License Act, 1883."

I.—Question—Are the following Acts in whole or in part within the legislative authority of the Parliament of Canada, namely :—

(1) The Liquor License Act, 1883.

(2) An Act to Amend the Liquor License Act, 1883.

II.—Question—If the Court is of opinion that a part or parts only of the said Acts are within the legislative authority of the Parliament of Canada, what part or parts of said Acts are so within such legislative authority?

And the said case having come before the Court for hearing on the 23rd day of September last, whereupon, and upon application of Mr. Bethune, Q.C., one of the counsel representing the Dominion of Canada, the said case so referred was amended by stating that in pursuance of section 26, sub-section 3, of the said Act, 47th Victoria, chapter 32, "An Act to Amend the Liquor License Act, 1883," the Provinces of Ontario, Quebec, New Brunswick, and British Columbia had become parties to the said case, and the said case having been subsequently further amended by stating that the Province of Nova Scotia had also become a party thereto.

And the said case, so amended, having come on for hearing before this Court in presence of counsel for the said Dominion of Canada and the said Provinces on the 23rd, 24th, 25th, 26th, and 27th days of September last past, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to reserve the said case for consideration, and the Court, having duly considered the same, do now certify to His Excellency the Governor-General in Council, in answer to the questions submitted for the determination of the said Court in the said

case, that, in the opinion of the said Court, the Acts referred to in the said case, namely, "The Liquor License Act, 1883," and "An Act to Amend the Liquor License Act, 1883," are, and each of them is, *ultra vires* of the legislative authority of the Parliament of Canada, except in so far as the said Acts respectively purport to legislate respecting those licenses mentioned in section seven of the said "The Liquor License Act, 1883," which are there denominated vessel licenses and wholesale licenses, except also in so far as the said Acts respectively relate to the carrying into effect of the provisions of the Canada Temperance Act, 1878.

The Honourable Mr. Justice Henry being of opinion that the said Acts are *ultra vires* in whole.

NOTE.—The clauses of the McCarthy Act which provide for the enforcement of the Canada Temperance Act, are the 142nd, 143rd, and 144th of the Act of 1883, as follows :—

142. A Board of Commissioners may, notwithstanding that such Act (the Canada Temperance Act) affects the whole of any county, be nominated therefor; and the said Board and the Inspectors shall have, discharge, and exercise all such powers and duties respectively for preventing the sale, disposal of, or traffic in liquor contrary to the said Acts or this Act, as they respectively have, or should exercise or perform under this Act.

143. The Board and Inspectors (appointed under the Dominion License Act) shall exercise and discharge all their respective powers and duties for the enforcement of "The Canada Temperance Act, 1878," and "The Temperance Act of 1864," as well as of this Act, so far as the same apply, within the limits of any county, city, incorporated village, or township, or parish in which the first mentioned Act or any by-law under the said secondly mentioned Act is in force.

144. A wholesale license to be obtained under and subject to the provisions of this Act, shall be necessary in order to authorise or make lawful any sale of liquor in quantities allowed under the provisions of the Canada Temperance Act, 1878.

SUPERIOR COURT.

MONTREAL, Jan. 10, 1885.

Before DOHERTY, J.

LA BANQUE JACQUES CARTIER V. THIBAUDEAU
et al.*Revision of rulings at enquête.*

PER CURIAM. An objection raised at *enquête* was overruled. The defendant asks to have that ruling revised. The reasons given in support of the application are not sufficient in law. But there is a more important point than that. I have consulted some of my brother judges, and I will take this occasion to state the rule to which I shall adhere with regard to appeals to this Court from the *Enquête* Court. To my mind it is exactly like taking an interlocutory judgment from a judge sitting on one side of a wall to a judge sitting on the other side, and asking him to reverse it. It would be like appealing from Philip in one condition to Philip in another condition, but as these conditions do not arise the illustration is irrelevant. The rule, however, which I propose to follow is this: Where an objection has been made at *enquête* if the judge has permitted the answer to be taken down I shall not interfere with the ruling. It is then a matter which can be remedied at the final hearing. But where the question is excluded by the judge at *enquête*, it is then a proper case for appeal to the judge in the Practice Court. The other judges to whom I have spoken, have decided to follow this course. The answer in the present instance was taken down, therefore I will not, sitting here, interfere with the ruling at *enquête*.

Motion rejected without costs.

Lacoste, Globensky, Bisailon & Brosseau for plaintiff.

Mercier, Beausoleil & Martineau for defendants.

SUPERIOR COURT.

MONTREAL, Jan. 12, 1885.

Before JETTE, J.

DE MAISONNEUVE V. LARUE, et LABRANCHE et
al., T. S.*Saisie-arrest before judgment—Effects removed
after the seizure.**Held, that the issue of a writ of saisie-arrest*

before judgment cannot be justified by facts subsequent to the seizure.

*Saisie-arrest quashed.**E. Lareau for the plaintiff.**J. J. Brauchamp for the defendant.*

SUPREME COURT OF CANADA.

OTTAWA, Jan. 12, 1885.

SULTZ V. THE CORPORATION OF THE CITY OF
THREE RIVERS.

*B. N. A. Act, 1867, sections 91, 92 — Liquor
License Act of 1878—41 Vict. ch. 3 (Quebec)
—Powers of Local Legislature to regulate sale
of intoxicating liquors—Delegation of power
to Municipal Corporations—41 Vict. ch. 3,
sections 36, 37, 255—20 Vict. ch. 129, and 38
Vict. ch. 76, s. 75.*

By a by-law passed by the Corporation of Three Rivers on the 3rd of April, 1877, under the authority conferred upon them by the charter of the city, 20 Vict. ch. 129, and by 38 Vict. c. 76, s. 75, a license fee of \$200 was imposed on persons desirous of obtaining a license to keep a saloon and sell intoxicating liquor.

By section 36 of 41 Vict. (Que.) ch. 3, it is enacted that on each confirmation of a certificate for the purpose of obtaining a license for the cities of Quebec and Montreal, the sum of \$8 is payable to the Corporation of each of these cities, and by other corporations, for the same object, within the limits of their jurisdiction, a sum not exceeding \$20 may be demanded.

Section 37 enacts, "The preceding provision does not deprive cities and incorporated towns of the rights which they have by their charters or by-laws."

Section 255 provides that "the dispositions of this Act shall in no way affect the rights and powers belonging to cities and incorporated towns by virtue of their charter and by-laws and shall not have the effect of abrogating or repealing the same."

On the 31st March, 1880, S. (appellant) filed with the Council of the Corporation of Three Rivers the certificate required by sec. 2 of 41 Vict. ch. 3, (Quebec), and on their refusal to confirm the certificate, except upon payment of the sum of \$200 imposed by the by-law of 7th April, 1877, he petitioned for a writ of

mandamus to declare the by-law null, and that the officials of the council be ordered to sign and deliver the certificate in question.

Held, affirming the judgment of the Court of Queen's Bench, Quebec (5 Legal News, 330), that the provisions of the Liquor License Act, 1878, (Quebec) are *intra vires* of the powers of the Legislature of the Province of Quebec.

2. That the power of sec. 37, excepts the by-law made 7th April, 1877, from the provision of sec. 36, and that the power which the Corporation of Three Rivers has to impose license fees on the sale of intoxicating liquors in virtue of 21 Vict. ch. 109, and 38 Vict. ch. 76, have not been repealed by the Liquor License Act, 1878.

Judgment confirmed.

Doutre, Q.C., for Appellant.

Denoncourt, Q.C., and *MacDougall*, for Respondent.

CONSENT GIVEN BY ERROR—WHAT CONSTITUTES RAPE.

In *Queen v. Dee*, Irish Ex. Div., Crown Cases Reserved, Dec. 1, 1884 (Ir. L. T. Rep.), the prosecutrix, a married woman, in the absence of her husband, lay down upon a bed when it was dark. The prisoner came into the room, and lay upon her. Thinking that he was her husband, she said to him: "You came in very soon," to which he made no reply. He then had sexual connexion with her, which she did not resist, until during the act, she discovered that he was not her husband. On a case stated, *held*, that the prisoner was guilty of rape. *R. v. Barrow*, L. R., 1 C. C. R. 156, overruled; *R. v. Flattery*, 2 Q. B. Div. 410, approved.

The judges delivered elaborate opinions, reviewing all the authorities, i. e., the British authorities. The judges do not seem to have agreed as to what constitutes rape, for May, C. J., said that connexion with a woman while unconscious does not constitute rape, but O'Brien, J., said just the reverse, and that undoubtedly is the law. 2 Bish. Cr. Law, § 1121. On principle, Pales, C. B., observed:

"Consent is the act of man, in his character of a rational and intelligent being, not in that of an animal. It must therefore proceed from the will—not when such will is acting without the control of reason, as idiocy

or drunkenness, but from the will sufficiently enlightened by the intellect to make such consent the act of a reasoning being. It is an instance of the application of a principle of widespread application, which in criminal law appears under the maxim *Actus non facit reum nisi mens sit rea*, which is acted on in cases of deeds and wills, to the execution of which it is of the essence that the mind accompany the act, in cases of contracts passing property where intention governs (*Merry v. Green*, 7 M. & W. 630), and in innumerable other cases. I feel that I owe an apology to my hearers in insisting upon so elementary a proposition, but nothing is in my opinion too elementary to encounter a doctrine so abhorrent to our best feelings, and so discreditable to any jurisprudence in which it should succeed in obtaining a place, as that which more than once was laid down in England, that a consent produced in an idiot by mere animal instinct, is sufficient to deprive an act of the character of rape.

Queen v. Fletcher, 1859, Bell C. C. 33; *Queen v. Fletcher*, 1866, L. R., 1 C. C. R. 40. I think it follows that (excluding cases in which an outward action apparently, but not in fact, accompanied by mind, is acted upon by another), any act done by one under the *bona fide* belief that it is another act different in its essence, is not in law his act—and that is the present case. The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was to the act of the husband only (and of this the prisoner was aware). As well put by Mr. Curtis, what the woman consented to was not adultery, but marital intercourse. The act was not a crime in law. It would not subject her to a divorce. Were adultery criminally punishable by our law, she would not be guilty. It is hardly necessary to point out (but to avoid any misapprehension I desire to do so) that what took place was not a consent in fact, voidable by reason of his fraud, but something which never was a consent *ad hoc*."

Lawson, J., said: "The question is, what must be the nature of the consent? In my opinion it must be consent to the prisoner having connexion with her, and if either of

these elements be wanting, it is not consent. Thus in *Flattery's* case, where she consented to the performance of surgical operation, and under pretence of performing it the prisoner had connexion with her, it was held clearly that she never consented to the sexual connexion; the case was one of rape. So if she consents to her husband having connexion with her, and the act is done, not by her husband but by another man personating the husband, there is no consent to the prisoner having connexion with her, and it is rape. The general principles of the law as to the consent apply to this case. To constitute consent there must be the free exercise of the will of a conscious agent, and therefore if the connexion be with an idiot incapable of giving consent, or with a woman in a state of unconsciousness, it is rape. In like manner, if the consent be extorted by duress or threats of violence, it is not consent. These are the true principles of law which govern the case, and which I have always heard laid down by the judges in Ireland; and the cases which contravene this principle I should not be disposed to follow, and they have never been followed in this country."

O'Brien, J., said: "The crime is the invasion of a woman's person without her consent, and I see no real difference between the act of consent and the act being against her will, which is the language of the indictment, though the distinction is taken by Lord Campbell, or between the negation of consent and positive dissent. Whether the act of consent is procured by the result of overpowering force, or of fear, or of incapacity, or of natural condition, or of deception, it is still want of consent, and the consent must be, not consent to the act, but to the act of the particular person, not in the abstract but the concrete, for otherwise the consent in principle would be just like the act of handing money in the dark to a person which was received by another, who would nevertheless in that case be guilty of a crime."

Murphy, J., said: "Where the will does not accompany the act, there is no consent. Every invasion of a man's person or property without consent or will, is against consent and will. A written document is placed before a man, which he reads and

understands, and by signing which he knows that some right or privilege is passing to another—he consents to sign it. Then turning aside for a moment, another document is substituted for that which he had read—believing it to be the same, he signs it. Is he bound by the contents of that which he signed? Has he consented to it? He certainly has not. This woman consented to intercourse with her husband. The accused induces her to believe he is her husband, and so obtains possession of her person. She never consented to this violation of her virtue—counsel for the crown said she did not consent to adultery; this was the act the accused committed. If the accused was not guilty of the crime of rape, which involves an assault on a woman's chastity and virtue, he was guilty of an assault, having done violence to her person by even touching her, without or against her consent; for before he can be held guilty of an assault this must be assumed. But at the same time, it is said he is not guilty of any assault on her virtue because she consented to the act of sexual intercourse. In my opinion, this is not law. If not guilty of the crime of rape, he was not guilty of assault. The accused was guilty of the felonious assault on this woman, just as much as a man, coming behind another and stunning him with a blow, before he was aware even of his presence, would be guilty of an assault causing actual bodily harm."

Bishop lays it down that the act of the prisoner in question is not rape, citing many authorities. 2 Cr. Law, § 1122. Wharton lays down the contrary. 1 Cr. Law, § 561. A recent holding like that in *Queen v. Flattery*, much relied on in the principal case, is in *Pomeroy v. State*, 94 Ind. 96; S. C., 48 Am. Rep. 146; 7 L. N. 278. The question is very much in doubt upon the authorities, but we think the Irish court is right in principle. The woman's consent to intercourse with her husband is not consent to intercourse with another man, and it is barbarous and illogical to hold that it is.—*Albany Law Journal*.

COURT OF APPEAL REGISTER.

MONTREAL, January 15.

Peters & Canada Sugar Refining Co.—Motion for substitution granted.

Burroughs & Wells.—Heard on motion of respondent, to be permitted to use in the Court of Review portions of the record, and for transmission of the record to the Court of Review.

Bury & Samuels.—Heard on merits; C. A. V.

Thibaudeau & Mills.—Do.

Robinson & McMillan.—Do.

St. Lawrence S. R. Co. & Campbell.—Do.

Jan. 18.

Senécal & Millette.—Motion to dismiss appeal; granted as to costs.

McMillan & Hedge, & Guilmette.—Petition to take up instance; granted.

Dominion Abattoir Co. & Hedge & vir, & Guilmette.—Do.

Goldring & La Banque d'Hochelaga.—Heard on merits; C. A. V.

Jan. 17.

Wylie & City of Montreal.—Heard on merits; C. A. V.

McMaster & Moffatt.—Commenced.

Jan. 19.

Guest & Douglas.—Heard on motion for non pro.

McMaster & Moffatt.—Hearing concluded; C. A. V.

Vallières & Ryan.—Heard on merits; C. A. V.

Les Commissaires d'Ecole pour la Municipalité St. Gabriel & Les Sœurs de la Congrégation Notre Dame.—Do.

Hurteau & Lawrence.—Do.

Jan. 20.

Cheney & Brunet, & Chauveau.—Application that the case be heard by privilege; rejected.

Bondy et al. & Valois et al.—Heard on motion for leave to appeal from interlocutory judgment.

McMillan & Hedge, & Guilmette.—Heard on merits; C. A. V.

Dominion Abattoir Co. & Hedge, & Guilmette.—Do.

Montreal, Portland & Boston Ry. Co. & Hamilton.—Do.

Lord & Davison; and Davison & Lord.—Hearing commenced.

Jan. 21.

Burroughs & Wells.—Motion of 15th instant granted; costs reserved. Record ordered to

be sent to the Court below to be used in Court of Review, and to be re-transmitted here after decision in the Court of Review, or upon an order of this Court.

Guest & Douglas.—Motion of 17th instant rejected, with costs against appellant.

Bondy & Valois.—Motion of 20th instant rejected with costs.

Ross & Langlois.—Judgment confirmed, Cross, J., diss.

Virtue & Vaillancourt.—Judgment confirmed.

Stanton v. Canada Atlantic Ry. Co.—Judgment reversed, and injunction quashed.

Société de Construction d'Hochelaga & Société de Construction Métropolitaine, & Gauthier.—Heard on merits; C. A. V.

Lord & Davison; and Davison & Lord.—Commenced.

Jan. 22.

La Corporation du Comté d'Yamaska & Durocher.—Appeal from C. C., Richelieu; cause put on the roll.

Cadot & Ouimet.—Appeal from C. C., Joliette. —Respondent appears.

Lord & Davison; and Davison & Lord.—Hearing on merits concluded; C. A. V.

Raymond dit Lajeunesse, & Latraverse.—Heard on merits; C. A. V.

Guilbault & McConville.—Do.

Salvas & Brien dit Durocher.—Do.

Tremblay & Denault, & Denault.—Case settled; inscription struck.

Jan. 23.

Lambe & Canadian Bank of Commerce.—Reversed; Dorion, C. J., and Cross, J., diss.

Lambe & Merchants Bank of Canada.—Do. Leave to appeal to P. C. granted.

Lambe & Ontario Bank.—Do.; do.

Lambe & Molson Bank.—Do.; do.

Lambe & Bank of Toronto.—Do.; do.

North British & Mercantile Fire Ins. Co. & Lambe.—Confirmed; Dorion, C. J., and Cross, J., diss. Leave to appeal to P. C. granted.

The Williams Manufacturing Co. & Lambe.—Do.; do.

Ogdensburg Coal & Towing Co. & Lambe.—Do.; do.

Export Lumber Co. & Lambe.—Do.; do.

Jan. 24.

Hamilton Powder Co. & Lambe (two cases).—

Application on the part of respondent that these causes be declared privileged, being a Crown case; rejected.

The Queen v. Prevost.—Heard on Reserved Case; C. A. V.

Les Sœurs de l'Asile de la Providence & Le Maire et al. de Terrebonne.—Heard on merits; C. A. V.

THE PRINCE'S MAJORITY.

The law is singularly bare in its recognition of the second generation of the Royal family, even in the case of its senior male representative, when the first generation includes his father. He is not even entitled in strictness to be called heir presumptive to the Crown, because there can be no heir presumptive when there is an heir apparent, and his father's titles admit of no courtesy title customarily borne by the heir apparent to them. His place in point of precedence is after his uncles, as was settled in 1760, when the Duke of York, in the lifetime of George II., took his seat in the House of Lords. Nothing remains except the comparatively modern title of Prince, to which must be added the first Christian name, as in point of law the first Christian name is the only Christian name, no one being entitled to more than one. Even the position during minority of a son of the Prince of Wales is rather vaguely defined by the law. In 1718 it was decided by a majority of ten judges to two that the education and care of the sovereign's grandchildren belong to the sovereign during the lifetime of their father; but the decision of the majority has had doubts thrown upon it. It has never been doubted that, at common law, the approval of the marriage of the sovereign's grandchildren belongs to the sovereign, and now, by statute, control is given to the Crown over the marriage of all the English descendants of George II. It is a popular error that a prince in the direct line of the throne comes of age, in the sense of capacity for reigning, before he attains twenty-one. The fact is that the heir to the throne is always capable of reigning, as the sovereign is never a minor. In the case of sovereigns of tender years, regents have been appointed; but the age at which sovereigns who were minors began to act for themselves has varied from time to time. Henry III. and Edward

III. were considered of full age to act as kings at eighteen; Richard II. and Henry VI. not till twenty-three; and by a statute of Henry VIII. his successor, if a male, was to be under guardianship until eighteen, and, if a female, until sixteen. The modern practice has been to make eighteen the full age of a sovereign, as evidenced by the statute in regard to the children of Frederick, Prince of Wales, in regard to the children of George III., and in regard to the children of her present Majesty and the late Prince Consort, in the event of that Prince surviving Her Majesty, and the heir to the throne being under that age. No age, however, is now fixed by law before attaining which the sovereign cannot reign without a regent. The attainment by Prince Albert of Wales of the age of twenty-one has legally even less significance than in the case of an ordinary subject. Although he is, like others, no longer under pupillage in the general sense, he, unlike them, is still not master of himself in regard to marriage.—*Law Journal* (London).

CHANCERY DIVISION.

LONDON, Dec. 13, 1884.

Before PEARSON, J.

THE BANBURY AND CHERLTENHAM DIRECT RAILWAY COMPANY V. DANIEL

(Law J. Notes of Cases.)

Agreement to make Railway—Contractor—Property in Materials Delivered, but not Fixed—Payment by Instalments—Engineer's Certificates.

By an agreement, dated August 15, 1882, and made between the plaintiff company and the defendant, a contractor, for the construction and completion of a railway, it was provided that once in each month, during the progress and until the completion of the railway, the company's engineer should certify the amount due and payable to the contractor, in respect of the value of the works executed and materials delivered, and that such certificates should be paid seven days after presentation to the company's secretary.

In November, 1884, the plaintiffs brought this action, claiming an injunction to restrain the defendant from removing from the company's land any materials then remaining thereon, which were included in the certificates of the company's engineer.

Cookson, Q.C., and A. Beddall now moved for an injunction.

S. Hall for the defendant.

PEARSON, J., held that, on the giving of a certificate by the engineer, the property in the materials comprised in it passed to the company, though the materials delivered were not yet fixed, but remained loose on the company's land, and granted the injunction accordingly.

The Legal News.

VOL. VIII. JANUARY 31, 1885. No. 5.

Section 28 of the Patent Act of 1872 provides "that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture or his deputy, whose decision shall be final." Under the authority of this Statute the Minister of Agriculture has pronounced an elaborate judgment, which appears in the present issue, declaring that the Bell Telephone Patent has become void in Canada. The minister refers to a decision of Mr. Justice Osler. This was rendered in the Common Pleas Division, Ontario, in December, *Re Bell Telephone Co. et al. v. The Minister of Agriculture*. Mr. Justice Osler held that a court or judicial tribunal for the determination of the matters referred to in the section was constituted by the Patent Act; and that the constitution of such a court was not *ultra vires* of the Dominion Parliament as infringing upon subjects of exclusive Provincial legislation; and also that it was competent for the Minister to decide as to the existence of disputes arising for his decision.

It will be observed that the Minister merely declares that the patent *has become void*, not that it was void from the first. He refers to a decision by Dr. Taché in *Barter v. Smith*. In that case the petitioner asked that the patent should not only be declared void, but that it had been void from the date of the expiration of the delay mentioned in the Act. The patent in that case was sustained, but on the point referred to Dr. Taché observed: "It has been hinted in the arguments, that should a decision intervene declaring a patent null and void, it ought to specify that the patent was voided at the date of the expiration of the delay mentioned in the law, and has stood null since to all intents and purposes. As this incidental question touches rights which do not come within this jurisdiction, it appears clear

"that, in duty and through respect for the higher courts, this tribunal is forbidden from entering such domain, even by expressing an opinion, being bound to restrict its investigations and decisions within the narrowest possible limits. The law orders that the Minister of Agriculture should say *whether a patent has or has not become null and void*, consequently the judgment is simply to decide *if it has or it has not*, as the case may be: all the consequences that may follow are to be adjudicated upon by the ordinary judges of such disputes between citizens." Mr. Pope appears to coincide with this view, and therefore the parties, with respect to infringements before the voidance of the patent, are left to their recourse before the ordinary courts.

Another year has gone by, and the New-York Appeal calendar shows an increasing list of cases unheard. The new calendar, according to the *N. Y. Herald*, contains nearly eight hundred cases. "When the Court adjourns for the summer vacation," says the *Herald*, "it will leave a docket of five or six hundred cases, which will be materially lengthened when the autumn session begins. The Court is crowded with business beyond its capacity to dispose of it, and until some means of relief is provided the pressure is likely to increase instead of diminish. This is an important matter, which demands and ought to receive the attention of the Legislature at the present session. When litigants have to wait two years or more for their rights to be determined on appeal the practical effect in many instances is simply a denial of justice."

Mr. Justice Stephen makes the following observations on law reform, in an article in the *Law Quarterly Review*:—"One of the many difficulties which stand in the way of improving the law of England, perhaps I might say the great difficulty, may be thus expressed. Those who have acquainted themselves with its provisions have, generally, neither the time nor the inclination to undertake any other task than that of administering it as an existing system. Besides, when a man has mastered an intricate and difficult system, he takes a positive pleasure not only

in the superiority which his knowledge gives him, but in that knowledge itself. The late Lord Wensleydale, whilst pitying the hard lot of a man who was ruined because his pleader had supposed his remedy to be trespass instead of case, added: 'No doubt it is hard on him. The declaration ought to have been in case. If it had been, he would have won; but if the distinction between trespass and case is removed, law, as a science, is gone—gone.' On the other hand, those who have not a professional acquaintance with law are almost certain to be baffled in any attempt which they may make to improve it by their ignorance of the subject. It has real and great difficulties, and to attempt to deal with the subject without careful previous study and a considerable amount of collateral knowledge is only to run the risk of making bad worse. Being strongly impressed with these views, and preferring a systematic attempt to improve the law to any other form of public life open to me, I have for some years past employed such leisure as I could command in writing expositions of existing branches of law at once technically correct and complete, and capable of being understood by any person of decent education, sufficiently interested in the subject to read books of moderate length about it requiring close attention. It seemed to me that if the law as it actually is, were, so to speak, translated into common English, and made accessible to the public at large, the materials for its re-enactment in an improved and simplified form—in other words, for its codification—would be provided, and I felt sure that the convenience of that process would be so generally recognized that if it were once begun, there would be every reason to hope that it might proceed quite as rapidly as would be desirable."

Some time ago the *Times* said the bar must look to its laurels, referring to the decline of eloquence and the growth in number of cases conducted without the assistance of counsel. There is no doubt, we regret to say, that forensic eloquence is not what it was. The number of counsel who can state a case with anything like elegance of diction may be counted on the fingers of one hand, while even fewer digits would suffice to enumerate those who have any power with juries. As to this last remark we do not know that it is altogether a reflection upon the bar. Their training now is on stricter legal lines; our best advocates are good lawyers, and are frequently too terse and logical for juries. Furthermore, juries of to-day are of a higher order than the juries of even twenty years ago, and are not so easily influenced by counsel.—*Law Times*.

PATENT OFFICE.

Ottawa, Jan. 24, 1885.

Before the MINISTER OF AGRICULTURE

In re BELL TELEPHONE PATENT.

THE TORONTO TELEPHONE MANUFACTURING CO.
v. THE BELL TELEPHONE CO. OF CANADA.

Patent Act of 1872—Combination of known elements—Importation after twelve months from date of Patent—Importation of manufactured parts to be put together in Canada—Refusal to sell.

1. An accidental delay, by which an importation arrived a day or two after the expiration of twelve months from the date of the patent, held not to avoid the patent.
2. The importation of manufactured parts to be put together in Canada avoids the patent.
3. Refusal to sell the right to use unconditionally an invention or to license avoids the patent.

The following is the text of the decision of the Hon. J. H. Pope, minister of agriculture, voiding the patent in the Bell Telephone case:—

This case is the second which has come before this tribunal. It happens that both cases concern interests of vast magnitude, a circumstance which contributed to enhance the sense of the heavy responsibility imposed by the law on me as the minister of agriculture or on my deputy in this respect. The first case, *Barter v. Smith*, was tried before Mr. Taché, in November, 1876, and his judgment was rendered in February, 1877.

I have to refer to that judgment, because it has been made the basis of argument by the learned counsel on both sides in this case, because it constitutes the declaratory law of the country on points raised by the application of the 28th section of the Patent Act of 1872, being in matter of doctrine and of legal interpretation unquestionably correct; and endorsed, as remarked by Mr. Cameron, by the highest judicial authorities, namely, the Court of Appeal of Ontario, the Supreme Court, and, in relation to this present case, by Mr. Justice Osler in his judgment rejecting an application for a writ of prohibition.

This tribunal is, therefore, bound to attach

great weight to the doctrine and rules of interpretation laid down in that judgment of the deputy minister, which judgment embodies the jurisprudence adopted in Canada, when dealing with that section of the Patent Act.

The feature of Patent No. 7,789, granted for what is known under the name of "Bell's System of Telephony," is peculiar in so far as it consists both of a process or art and of a portion of the machinery necessary to carry it into practice. The two elements are inseparable; the electric circuit and the two instruments are the means of giving a practical and tangible shape to "Bell's system of telephony." Moreover, the instruments—described in the specification and illustrated in the drawings of the patent—are the mechanical contrivances which distinguish this invention from other methods of getting at a similar result. All the elements of which these instruments are composed are of the public domain, and public are also the means of erecting an electric circuit; therefore the patent is a patent for a new and useful combination of old elements, to attain an object known beforehand. The combination is the invention, and consequently the subject matter of the patent, and the mechanism of which it is constituted are new articles of manufacture.

The doctrine, universally admitted, of the patentability of a variety of combinations of the same elements for the same object has been clearly laid down by the Supreme Court in *Smith v. Goldie*. What is patentable is the subject of a privilege, and in Canada submitted to the conditions of section 28 of the Patent Act.

This patent, like every other patent granted, is therefore under the obligations exacted from all patentees by section 28 of the Patent Act of 1872, and subject to the adjudication of this tribunal, should disputes arise as to whether it has or has not become null and void under the provisions of this section.

The patent was granted on the 22nd of August, 1877, to Mr. Alexander Graham Bell, and is now, through a series of assignments, the property of "The Bell Telephone Company of Canada," the respondents in the case. It must be remarked that it matters not who

the owners are for the time being or were at any time; it is the patent which stands before me as the minister of agriculture to be adjudicated on, not the owners. The patent does so stand with the uninterrupted privileges as well as with the uninterrupted obligations attached to it.

This tribunal has not to investigate the *locus standi* of disputants nor of respondents, nor in relation to companies, to inquire whether they are legally incorporated or not; such questions are not within its jurisdiction and, besides, are quite indifferent to the issue in such cases. When this tribunal is made aware that disputes are raised, in accordance with the provisions of the 28th section, by some person who undertakes to prove his allegations, it immediately becomes the duty of the judges of such disputes to investigate the matter in the interest of public rights, if the policy of the law has not been carried out, or in the interest of patent rights if the obligations have been fulfilled. I, as minister of agriculture, have not to undertake to initiate cases of disputes, but I must take notice of all cases brought before me in a formal way.

The first allegations of the petitioners in this case are that illegal importations have been made of the patented articles, after twelve months from the date of the patent, specifically in the latter days of August, 1878, in January, 1879, and during the years 1880 and 1881.

The facts of the first alleged act of illegal importation are as follow:—During the first year of the existence of the patent, the patentee or his representatives in Canada had contracted with Mr. Charles Williams, of Boston, in the United States, for one thousand telephones to be delivered within the twelve months allowed by law for importing the invention. At the expiration of the twelve months Mr. Williams had not been able to complete his contract, more than half of the number contracted for having not been furnished. Under the misapprehension created by the date of the registering of the patent (24th August) that the twelve months would only expire with the 24th day of August, 1878, Mr. Williams did forward from Boston, on the 23rd day of the same month, a lot of seventy-five telephones, which, in the

ordinary course of transit, should have entered Canada on the 24th, but which, owing to some mishap, did actually pass the frontier only a few days after. The circumstances of these facts show that there was no intention to break through the law, and that the importation was not considerable; therefore this case of importation in the latter part of the month of August, 1878, cannot entail the avoidance of the patent.

At the same time that no stress is put upon these facts, it is, nevertheless, an occasion to warn patentees in general against the danger of running so close to the expiry of the twelve months as to incur the risk of coming even a day too late with their last importation. This tribunal is a paternal tribunal, the judges of which are the natural protectors of the patentees' rights; and, as such, bound to give to the facts the most liberal construction consistent with a compliance with the spirit of the law; but the patentees are the first guardians of their own interests and should not put their property in jeopardy, by placing these judges in the position of being obliged to overstretch leniency in order to save their patents.

During the first year of the existence of the patent, then, the patentee or his legal representatives, imported, or caused to be imported, about five hundred instruments ready for use, as they had a right to do; a few days after the expiration of the twelve months they also imported, or caused to be imported, seventy-five complete instruments, which latter importation being inconsiderable and apparently done in good faith, and not with any intention to evade the law, is declared not to have forfeited the patent. There remains now to examine what was done after that time.

It is desirable, first, to enter into a cursory examination of the instruments patented as new articles of manufacture. It will, however, be sufficient to investigate the elements of one of these two instruments, the one commonly called the "hand telephone," represented in figure 6 of the drawings of the patent. It consists, 1st, of a casing with a side cover, the whole being at the same time a handle, with a flat ring piece fixed to it, called disk in the trade, and a perforated cup-like screwed top, the whole and the four distinct parts of which are of a form special to this new article of manufacture; this handle casing may be made of any suitable materials, but as a matter of fact is in this case made of hard rubber; 2nd, of four bars of magnetized steel, bound together by screws and nuts; 3rd, of two soft iron pieces, called drop forgings; 4th, of a bobbin, on which silk covered, small copper wires are rolled around; 5th, of wire posts, also called screw cups, and a regulating screw; 6th, of a metallic vibrating plate or diaphragm, some-

times called disk, as a matter of fact cut out and otherwise worked from what is commonly called japanned or ferrotype plates; 7th, of a few other insignificant articles of construction.

It will expedite matters to consider together the two questions raised in the dispute, of illegal importation and of non manufacture; for in the measure that illegal importation goes on, in that measure the industry and the labor of the country are deprived of the benefit of manufacturing.

Therefore, we have to examine what, in these instruments, is raw material which does not fall under the application of the 28th section, and what are industry and labor; because it is clear that if the aggregate amount of industry and labor entering into the making of such instruments was merely trifling, unless a criminal intention of totally disregarding the law was shown, which is not the case here, it would not be a liberal nor a reasonable interpretation of the spirit of the law to destroy the patent, on account of its importation or non-manufacture; if it were, for instance, amounting in all to a value of ten dollars a year, as the learned counsel, Mr. Macdougall has it, with the Latin maxim—*de minimis non curat lex*, or even if it were ten times as much as that for every year.

As already said, it will suffice to confine our study of the case, to the examination of one of the two instruments patented, the "hand telephone." The raw materials of this instrument comprise, steel in bars, soft iron, wood and vulcanized rubber, to which must be added, as common articles of commerce, silk covered wires, japanned plates or sheets of ferrotype, as some call them, screws, nuts, and may be wire posts. The value of each hand telephone complete is about \$2.00; the value of the raw materials, including common articles of commerce, entering into each instrument, may be said with certainty, not to reach the aggregate of \$0.90. Therefore the industry and labor put upon each of these instruments may be set down at about \$1.10. One would be inclined to take a much more exalted idea of the value of the labor put upon the two instruments patented from the statement made by Mr. Sise, the general manager of the Bell Telephone Company of Canada, that their telephone factory at Montreal, established in 1882, has \$50,000 capital invested in it, and that the pay roll of that factory amounts to \$30,000 a year wages; notwithstanding that the rubber handles of the hand telephone are not yet manufactured in Canada, as we have it from Mr. Sise, who says that they cannot get them made in Canada, having again vainly tried to do so a week before he gave his evidence in this case; which, of course, can only mean that the Bell Telephone Company have not pro-

cured for themselves the moulds to manufacture those rubber handles. Although Mr. Sise does not discriminate the work done at their Montreal factory, it is clear that such an amount of yearly wages cannot be exclusively devoted to the making of the two instruments patented in patent No. 7,788; but the statement, with all its surroundings, proves that the manufacture of the two instruments is not an insignificant trifle, but is, on the contrary, an advantage worth being looked after; there are many thousands of them now in use in Canada, and there were, at least, several thousand, when the Montreal factory was started.

The question comes then:—Has the patentee or his legal representatives imported or caused to be imported, after twelve months of the existence of their patents, the new articles of manufacture patented? There cannot be a shadow of doubt that they have so imported or caused to be imported the articles, manufactured in parts, to be simply put together at an amount of labor, at times paid \$0.30, at other times \$0.27, in Canada. It is in fact, virtually admitted by them, when pleading that putting together or "assembling" the parts ready made, is construction and manufacture, in the meaning of the law.

It is equally evident that, during the same period, that is coming to the year 1882, they have failed to manufacture to the extent that they have imported, and that, from the year 1882 to the date of hearing the evidence of Mr. Sise, the 3rd December, 1884, they had been importing rubber handles in a manufactured state.

The intention, although not malicious, to evade the law, is nevertheless manifest. During that considerable time of the existence of the patent (to 1882), the same foreign manufacturer, Mr. Williams, with whom the patent owners had contracted for one thousand telephones to be delivered during the first twelve months of the life of the patent, and who furnished only about five hundred during that period of time, did continue to send them into Canada for years, to supply an ever increasing demand; but to evade the law and give color to the importation, instead of sending these instruments consigned to the patentee's representatives, he sent them in pieces to be put together in Canada, to some one through whose intermediary the patentee's representatives received them when "assembled."

All this is proved in the clearest manner by customs papers, by accounts furnished, by declarations from one Cowherd, from Mr. Foster, and by correspondence on the subject. We have it from Mr. Sise himself, with some reticence but also with some details. He explains the reason why this importation and this non-manufacture were

resorted to. "Mr. Charles Williams, one of the owners of the patent," says Mr. Sise, "was and is the only manufacturer of Bell telephones in the United States; he is the only man who is licensed by the Bell Telephone Company to manufacture telephones; he is the only manufacturer to-day that I have any knowledge of. . . . Mr. Charles Williams was the only man who had any knowledge of it, and who had the control of Cowherd's shop. . . . I think we paid Williams, and I think he was the man who employed Cowherd. . . . Mr. Williams having arranged with Mr. Cowherd to manufacture in Canada, Mr. Cowherd had a number of machines on hand (at the time of Cowherd's death), and Mr. Foster continued the manufacture, and my impression is that he continued to contract with Mr. Foster until we got our shop into such shape that we could make ourselves. . . . There was no time or period when we were not supplied with telephones for the public, either from Cowherd, Mr. Foster and our own manufacture. They were continuously manufactured, inasmuch as they were ready for the public always when they came for them."

So far as the law requires a prompt introduction in Canada of a patentee's invention, the patentees have observed the law, as Mr. Sise remarks, but the protective policy of the Patent Act, they have, in intention and effect, disregarded and defeated to a very large amount of the industrial manufacturing value of the patented article.

In support of the pleading that the importation of an instrument in parts is no importation, Mr. Wood, on behalf the respondents, quoted a recent ruling of the English courts (*Townsend v. Hawthorne*), in which case it was decided that the importation of the materials of a composition of matter was no infringement of the patent, and, says the learned counsel with reason so far, what is no matter of infringement cannot be a matter for illegal importation. So far so good; but the conclusion, which is correct in the abstract, fails in the concrete, as applied to the present case. The materials of the composition are raw materials unworked; such as would be, in the present case, steel in bars, iron as a commercial article of trade, rubber and even silk covered wires: but the moment these are worked into shape and form, to constitute a Bell telephone, they cease to be raw materials and become a manufactured article. Mr. Taché, in his judgment, has anticipated the ruling of the English courts, in the very species of case cited by Mr. Wood. "It is not difficult," says Mr. Taché, "to imagine a case in which the importation of all and every one of the component parts of an invention, to be simply put together in Canada would not be an importation in the meaning of section 28 of the Patent Act * * * for

example, the case of a patent granted for a composition of matter." It is immediately after this that Mr. Taché adds, referring to such cases, "every one of which must stand on its own merits."

The other and last allegation of the disputants is that the patentees have refused to sell their invention after two years of the existence of their patent, namely, to the inhabitants of Port Perry in 1882, to Messrs. Lohnes and McKenzie in 1884, to others, and generally refused to sell in order to monopolize the control of telephonic operations throughout Canada, and derive, from their invention, more than what they were entitled to for the use thereof.

A question has been raised on the meaning of the words sale and license as applied to patents. One of the learned counsel was under a misapprehension about the signification of the words used by Mr. Taché in his decision—"license the right of using on reasonable terms." In this sentence the word license is employed in its broad technical sense in patent science; it does not mean a lease upon payment of a rental, but the absolute transfer of a property, which becomes vested in the licensee or purchaser *quoad* the result suggested by the nature of the invention and the extent of the purchase in point of number. Of course, if one or many of the public prefer to lease and agree to do so, there is no disability created by the law to prevent them from entering into such a contract.

There are, in the nature of things, three sorts of contracts in relation to patents:—1st. The license to use, or by the purchaser furnishing himself with the means to use. 2nd. The sale of the means to use the invention. 3rd. The assignment of the whole or portion of the patentee's privileges. As tersely expressed by Judge Hall, in *Pitta v. Hall* (2 Blatchford, 229): "A license, or assignment, or sale of a machine is a transfer, *pro tanto*, of the property secured by the patent."

In all these cases, however, it must be borne in mind that our Patent Act differs essentially from the English and present American laws. Our patentees are bound to license, that is, to sell the use of their invention, and bound to see that their invention is not imported after twelve months, and that it be manufactured in Canada after two years, because connivance in an importation is equal to importing or causing to be imported. On the contrary, the English and American patentees are at liberty to import, and at liberty to entirely withhold from the public use, their inventions, if they choose to do so; therefore, they can select their own conditions in a contract, in the nature of which they are bound of course when entered upon; but into which they are not forced by law.

The instances of refusal to sell which were the subject of evidence in this case are several, but, with the exception of three, they are mixed, or seem to be mixed, with demands to use poles, wires, communication with lines and exchanges, which, naturally, the patentees are not bound to furnish. The three clear instances of refusal are: 1st, The case of Mr. Bate, of Ottawa, commenced in April, 1883; 2nd, The case of Mr. Dickson, of Montreal, commenced in November, 1883; 3rd, The case of Mr. Richard Dinnis, of Toronto, commenced in March, 1884. The correspondence is completed and certified by statutory declarations.

In the case of Mr. Bate, he wrote on the 14th April, 1883, to the Bell Telephone Company of Canada asking them to give him their lowest prices for three telephones, including transmitters, for a private line. He was answered by Mr. McFarlane that their agent at Ottawa was directed to call on Mr. Bate. Mr. Bate wrote a second letter to the company to explain that he wanted to purchase and not to rent the instruments. Mr. Sise, in answering this second letter, intimated to Mr. Bate the following: "We do not sell telephones, but we rent them."

In the case of Mr. Dickson, a protracted correspondence took place, first opened with Mr. Scott, agent of the company, to be continued with Mr. Sise, in which Mr. Dickson insisted on his right to get the instruments as his property, according to law, and Mr. Scott and Mr. Sise declined to sell, but offered to lease or rent. To close the correspondence, Mr. Dickson informed the company that being thus denied the purchase of the instruments, he had decided to have them constructed himself for his own use; to which threat Mr. Sise answered that they could not consent to an unconditional transfer, but would sell a Bell telephone for thirty dollars, subject to the stipulation "that it is to be used only between certain specified points."

In the case of Mr. Richard Dinnis, he wanted to purchase three sets of telephones to connect his office, his residence and his factory, and asked to be informed of the cost. Mr. Sise answered him that they had never sold these instruments, but that he (Mr. Dinnis) could have three sets rented at the rate of \$20 per annum, he (Mr. Dinnis) building his own line; but that he would sell the instruments to him for \$100 per set to be used only for the purpose stated by Mr. Dinnis. Mr. Sise refers Mr. Dinnis to Mr. Neilson, agent of the company at Toronto, for further information. Mr. R. Dinnis, in an interview with Mr. Neilson accompanied by Mr. Arthur Dinnis, both of whom render an account of the interview by statutory declarations, tried to get information from Mr. Neilson about prices, and asked if he could get the instruments at a more reasonable price and uncon-

ditionally, but was answered by Mr. Neilson that he could not give any other answer than the one contained in the letter of Mr. Sise. The price asked was unreasonable and with a limitation of use.

The case of Mr. Bate was one of flat refusal. The two other cases were instances of protracted resistance, ended by offers to sell under restrictions, some of which were beyond the privileges of a patentee. The limitation as to where to use the invention, after purchase, is similar to a sale of patented sewing machine to be used only in a particular house, or the sale of a patented plough to work only a given plot of land. The patent license, in Canada, accompanies the purchaser wherever he chooses to move on the wide territory of the Confederation, provided he does not use more than the number of articles purchased.

The policy of refusal to license or sell, for the purpose of leasing at a rental, is made plain again by the answers, although very reticent, of the manager of the company to the interrogatories of counsel. A few quotations of his evidence will suffice:—"I do not think," says Mr. Sise, "there has ever been a set sold by us." "I would not swear that we have not refused to sell private telephones. I would not say we did." "I should not be able to say whether we had absolutely refused to sell unconditionally one or two or more instruments, nor would I say that we had not." "I do not think we ever sold an instrument unconditionally."

The whole case is plain on the face of it, and it is also plain that the patentees or their representatives had in view to build up a commercial enterprise (for the benefit of the public as they contended), rather than content themselves with getting their mere royalty on licenses or sales as patentees. With such intention, simply, there is nothing to find fault, so far as this tribunal is concerned, if the steps necessary to carry it out had not led them beyond the provisions of the Patent Act.

The conclusion is that the patentees, the respondents in this case, or their representatives, having extensively imported the patented articles after the expiration of twelve months from the date of their patent; having not manufactured in Canada the said articles to the extent they were bound to do, after two years of the existence of their privilege; having resisted and refused to sell or deliver licenses as required by the statute, to persons willing to pay a reasonable price for a private and free use of the patented invention, they have forfeited their patent.

Therefore I decide that Alexander Graham Bell's patent (No. 7,789) for "Bell's System of Telephony" has become null and void, under the provisions of section 28 of "The Patent Act of 1872." Patent annulled.

Christopher Robinson, Q. C., and J. R. Roaf,
for Petitioners.

Hector Cameron, Q. C., Dalton DeCarthy, Q. C., Wm. Macdougall, Q. C., and S. G. Wood,
for Respondents.

SUPERIOR COURT.

MONTREAL, Jan. 17, 1885.

Before TASCHEREAU, J.

LUNN et vir v. THE WINDSOR HOTEL CO. OF
MONTREAL.

City of Montreal—Special Assessment—42-43
Vict. (Que.), ch. 53.

The assessment roll prepared to defray the cost of a special improvement in the city of Montreal was set aside by the Courts, and a new roll was made for the same improvement under the authority of an Act of the provincial legislature.

Held, that the assessment under the new roll must be paid by the person who was proprietor at the time the new roll came into force, and that he has no recourse against the antecedent proprietor.

Davidson, Cross & Cross for the plaintiffs.

Abbott, Tait & Abbotts for the defendants.

COURT OF APPEAL REGISTER.

MONTREAL, Jan. 26.

Sharpe & Cuthbert.—Heard on merits; C. A.V.

Normandeau & Dickinson.—Appeal dismissed, appellant not proceeding.

Danereau & Letourneau.—Heard on merits; C.A.V.

Arless & Belmont Manufacturing Co.—Do.

Tye & Fairman.—Do.

Jan. 27.

The Queen v. Prevost.—Reserved Case sent back for amendment.

Stephen & La Banque d'Hochelaga.—Motion for additional security, rejected.

Black & Shorey.—Judgment confirmed.

Pillow & Recorder's Court.—Judgment confirmed.

Biron & Trahan.—Judgment confirmed, Ramsay, J., dissenting.

Tourville & Ritchie.—Judgment confirmed, each party paying costs of printing his factum.

Wright & Moreau.—Judgment confirmed.

The Exchange Bank of Canada & The Queen.—Motion that the case be heard by privilege, granted; hearing on 16th March.

Campbell v. Bate, & Cunard Steamship Co.—

Heard on motion for leave to appeal from interlocutory judgment, C.A.V.

Smith & Fairbanks.—Motion to dismiss appeal, rejected.

Scottish American Insurance Co. & Bury.—Appeal dismissed (*perimé*).

The January Term then came to an end.

BUSINESS FAILURES IN 1884.

The following is a statement of the failures in Canada and Newfoundland during 1884, by Provinces:—

	No.	Liabilities.
Ontario.....	608	\$9,602,392
Quebec.....	401	4,766,180
New Brunswick.....	73	1,570,337
Nova Scotia.....	140	2,068,860
Newfoundland.....	19	251,536
P. E. Island.....	7	146,000
Manitoba.....	79	786,001
Total.....	1,327	\$19,191,306

The total number of failures is somewhat less than in 1883, but the liabilities are greater, a comparison with the previous years giving the following result:—

	Number.	Liabilities.
1884.....	1,327	\$19,191,306
1883.....	1,384	15,949,361
1882.....	787	8,587,657
1881.....	635	5,751,207
1880.....	907	7,988,077
1879.....	1,902	29,347,937
1878.....	1,097	23,908,677

A comparison by provinces shows the following figures:—

	1883.	1884.
Ontario.....	567	608
Quebec.....	438	401
New Brunswick.....	48	73
Nova Scotia.....	89	140
Prince Edward Island.....	5	7
Newfoundland.....	5	19
Manitoba.....	232	79

And the amount of liabilities in the same period was as follows:—

	\$4,700,000	\$9,602,392
Ontario.....	6,400,000	4,766,180
Quebec.....	747,000	1,570,337
New Brunswick.....	1,068,000	2,068,860
Nova Scotia.....	40,000	146,000
Prince Edward Island.....	48,000	251,536
Newfoundland.....	2,869,000	786,001
Manitoba.....		
Total.....	\$15,949,361	\$19,191,306

CRIMES AT SEA.

Sir Sherston Baker in his interesting article in the current number of the *National Review* on the Mignonette Case hardly proves the very ingenious point which he takes. It is true, as he points out, that the Act of Henry VIII. transferring the jurisdiction to try crimes on the high seas from the Admiralty Courts to the ordinary Criminal Courts deals only with procedure and not with substantive law, so that if immediately after the passing of that Act the law of murder as un-

derstood in the Admiralty Courts was different from the common-law idea of murder the Admiralty view prevailed. The existence of any such distinction is, however, not shown by the citation of more or less vague passages from more or less obscure writers on the civil law. The civil law is no part of the law of England unless it has been adopted by the English Courts, and it lay on Sir Sherston Baker to show that the Admiralty Court had adopted the principle that a man may be killed at sea to sustain life without the commission of murder. He has not succeeded even so far, and it would be an absurdity if at any time in the history of the law an act was at once criminal when the tide was out, and justifiable or even laudable on the same spot when the tide was in. In regard to the law of the present day, and as applicable to the Mignonette Case, the matter has been put beyond doubt by 39 Geo. III. c. 37, passed to amend the Act of Henry VIII. This Act provides that 'all and every offence and offences which, after the passing of this Act, shall be committed upon the high seas out of the body of any county of this realm shall be, and they are hereby declared to be, offences of the same nature respectively and to be liable to the same punishments respectively as if they had been committed on the shore, and shall be inquired of, heard, tried, and determined, and adjudged in the same manner as treasons, felonies, murders, and confederacies are directed to be by the same Act.' We do not think this Act is referred to by Sir Sherston Baker. — *Law Journal* (London).

GENERAL NOTES.

Le plus ancien journal du monde que l'on connaisse est sans doute le journal intitulé "*Acta populi romani diurna*," dont il existe encore un numéro remontant à l'année 168 avant Jésus-Christ, et dont voici la traduction:—Le 29 mars, Livinius a exercé aujourd'hui les fonctions gouvernementales.—Un violent orage a éclaté dans la journée d'aujourd'hui, la foudre est tombée sur un chêne, peu après midi, dans la proximité de la colline Véli, et l'a fendu en plusieurs morceaux.—Il y a eu une rixe dans une auberge qui a pour enseigne l'Ours, tout près de la colline de Janus; l'aubergiste a été grièvement blessé.—L'édile Titinius a condamné les bouchers qui dépècent la viande, attendu qu'ils ont vendu de la viande au peuple, qui n'avait pas été soumise à l'inspection des autorités. Les amendes ont servi à élever une chapelle à la déesse.—Le changeur Ausidius, dont le bureau a pour enseigne le bouclier du Cimbre, a pris la fuite en emportant une somme considérable. On l'a poursuivi et on est parvenu à l'atteindre. Il avait encore sur lui tout l'argent emporté.—Le préteur Fontqueus l'a condamné à restituer tout cet argent à ceux qui l'avaient déposé chez lui.—Le chef des brigands Denniphon, arrêté par le légat Nerba, a été crucifié aujourd'hui dans le port d'Ostie.—En lisant ces faits, ne dirait-on pas qu'ils viennent de se passer aujourd'hui même. Changez seulement les noms, et cette petite gazette est toute d'actualité. Il n'y manque que les nouvelles à la main et les échos de théâtres.—*La Minerve*.

The Legal News.

VOL. VIII. FEBRUARY 7, 1885. No. 6.

In the case of *Stevens & Fisk* the Supreme Court of Canada stood four for reversing, and one for confirming. Chief Justice Ritchie and Justices Fournier, Henry and Gwynne constituted the majority. The dissentient opinion was by Mr. Justice Strong. Mr. Justice Taschereau did not sit. We print a report, with the text of the opinions of Justices Henry and Gwynne in the present issue.

A remarkable phase of modern litigation in England is the number of cases in which the suitor appears in person. For example, in the Queen's Bench list of trials for Hilary sittings no less than forty cases are marked as conducted in person on one side or the other—in twenty-two the plaintiff appears, and in eighteen the defendant. There are other cases, also, in which a solicitor is engaged, but the client takes the place of counsel at the trial. This would appear to indicate either that the fees of counsel are so high that suitors cannot pay them, or that the knowledge of law which Blackstone said every gentleman should possess is becoming a more common accomplishment at the present day. Thus far in Montreal we can count on the fingers of one hand the cases personally conducted in which the party appearing was not himself a member of the profession.

The *London Law Journal* referring to the manner of judges towards the bar, says the judge's duty is towards the party, "and in the interests of justice he should ensure that the party whose advocate, from whatever cause, requires encouragement in his task should receive that encouragement. The experience of the Courts is, on the contrary, that too frequently arguments are tolerated in the mouths of leading counsel which a junior would never be allowed to advance for a moment. The practice of Sir George Jessel in this respect was to some extent due to an intellectual contempt for his successors in

high place at the bar, and he perhaps erred in being too severe towards leading counsel unfamiliar to him. His successor on the bench fully understands the duty of encouraging young counsel, and this is the practice of all generous and right-minded judges." It is to be regretted that some judges after being a long time on the bench, occasionally appear to forget that they and the advocates pleading before them are members of the same profession, exercising different functions. A senior, if guilty of discourtesy to a junior at the bar, would be set down at once as a gross offender against decorum; still less excusable is it for a judge to be unnecessarily severe to a young advocate, because the parties are not fairly matched, and the offence cannot easily be punished as it deserves to be. It must be acknowledged, however, that a large majority of our judges are models of forbearance and courtesy, even under circumstances of provocation which sometimes might be held to excuse a momentary forgetfulness of what is due to the pleader's office.

Lord Bacon, if not himself in all respects a model judge, seems to have had a remarkably clear idea of what a model judge should be. "Patience and gravity of hearing," he says, "is an essential part of justice, and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four: to direct the evidence; to moderate length, repetition or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory and willingness to speak, or of impatience to hear, or of shortness of memory, or of want of a staid and equal attention. It is a strange thing to see that the boldness of advocates should prevail with judges; whereas they should imitate God, in whose seat they sit, who represseth the presumptuous, and giveth grace to the modest; but it is more strange that judges

should have noted favorites, which cannot but cause multiplication of fees, and suspicion of by-ways." Little can be added to these words of the Lord High Chancellor. They are as fresh now as when they were written nearly three centuries ago.

The text of the opinions of the judges of the Court of Appeal in the Provincial Tax Cases is about to appear in a few days in the *Montreal Law Reports*, Queen's Bench Series. The *considerants* of the judgment are very concise, and we append them here:—

"The Court, etc....

"Considering that the taxes complained of in this cause were and are imposed by a Statute of the Legislature of the Province of Quebec passed in the 45th year of Her Majesty's reign and being numbered chapter 22 of the Statutes of the said year;

"And considering that the said Legislature had power to impose the said duties, inasmuch as the said taxes are direct taxes within the Province and were imposed in order to raise a revenue for provincial purposes;

"And considering furthermore that, even assuming the said taxes should be considered as not falling within the denomination of direct taxes, the said Legislature had power to impose the same, inasmuch as the said taxes were matters of a merely local or private nature in the Province;

"And considering, therefore," etc.

SUPREME COURT OF CANADA.

OTTAWA, Jan. 12, 1885.

Before RITCHIE, C.J., STRONG, FOURNIER, HENRY and GWYNNE, JJ.

STEVENS (Plaintiff), Appellant, and FISK (Defendant), Respondent.

Foreign Divorce—Jurisdiction—Status of Foreigner—Domicile of Wife in Divorce Cases—Authorisation.

The parties were married in New York in 1871 with an interrupted contract, both being at the time domiciled in that city. By the laws of the State of New York no community of property was created by such marriage, the wife retaining her private fortune free from marital control, like a femme sole. Shortly after the marriage the Appellant entrusted Respondent with the whole of her private fortune consisting of personalty to the amount of over \$200,000, and Respondent administered this until 1876. The couple lived in New York until 1872, when they removed to Montreal, where the Re-

spondent has ever since resided and carried on business, but Appellant left him shortly after to take up her residence alternately in Paris and New York. In 1880, when Respondent was still in Montreal, the Appellant, then in New York, instituted proceedings against him for divorce before the Supreme Court of New York on the ground of his adultery. The action was served on Respondent personally at Montreal, and he appeared in the suit but did not contest, and Appellant obtained a decree of divorce absolute in her favour in December 1880. In 1881 Appellant taking the quality of a divorced woman, and without obtaining judicial authorisation, instituted an action against the Respondent in the Superior Court in Montreal for an account of his administration of her property. The Respondent pleaded that the alleged divorce was null and void for want of jurisdiction of the Supreme Court of New York, that the Appellant was in consequence still his wife, and that she should have obtained the authorisation of the Court to institute the present action.

Held:—(reversing the decision of the Court of Queen's Bench and restoring the judgment of the Superior Court—Strong, J., diss.)

1. *That the Supreme Court of New York had jurisdiction to pronounce the divorce, and that the divorce was entitled to recognition in the Courts of the Province of Quebec.*
2. *That the Supreme Court of New York having under the statute law of New York jurisdiction over the subject matter in the suit for divorce, the appearance of the Defendant (now Respondent) in the suit absolutely and without protesting against the jurisdiction, estopped him from invoking the want of jurisdiction of said Court in the present action.*
3. *That the Plaintiff (now Appellant) had at the date of the institution of the action for divorce a sufficient residence in New York to entitle her to sue there. (The American doctrine of allowing wife to establish a separate forensic domicile in divorce cases quoted and approved.)*
4. *(Per Fournier and Gwynne, JJ.) That even if the divorce in question were not entitled to recognition in the Courts of Quebec, the action to account could still be maintained under article 14 C. C. P.*

GWYNNE, J.—The plaintiff and defendant being natural born citizens of the United States of America,—the plaintiff being a

native of the State of New York and the defendant a native of the State of Vermont—and both being in the month of May, 1871, resident inhabitants of and domiciled in the city of New York, in the State of New York, were in that month married to each other at the city of New York according to the law of the State of New York. At the time of the solemnization of the said marriage the plaintiff was possessed of a large separate estate, consisting of personalty amounting to over \$220,000, which property, by the law of the State of New York, continued after the marriage to be her separate property, absolutely free from the control of her husband as if she were still sole and unmarried. Shortly after the marriage the whole of the securities in which the above sum was invested were placed by the plaintiff's authority in the possession of the defendant, who thereby became the agent of the plaintiff in respect thereof, and accountable to her for his administration thereof. In the month of October, 1872, the defendant moved with his wife from the State of New York into the Province of Quebec, and he has since resided and still resides at the city of Montreal in that province. His wife lived with him at Montreal until some time about the month of October, 1876, when she returned to her mother in the city of New York, the plaintiff's original domicile.

Whether or not the defendant took her back to her mother upon this occasion does not clearly appear, for being asked in his examination in this cause, "Whether he did not, a short time previous to October 1876, accompany the plaintiff to New York city, and part with her there for the last time?" the only answer which the defendant gives to this enquiry is that he does not remember. But whether he accompanied her or not upon that occasion does not appear to be important.

In the month of February, 1880, the plaintiff, being then a resident and inhabitant of the State of New York, residing with her mother in the city of New York, instituted proceedings in the Supreme Court of the State of New York against her husband, for the purpose of obtaining a divorce *a vinculo matrimonii* and dissolution of her said mar-

riage in consequence of adultery alleged by her to have been committed by him.

At the time of the institution of this suit there was no court in the Province of Quebec, where the defendant was resident, competent to entertain such a suit. The subject of divorce and dissolution of marriage is a subject over which the Province of Quebec has no jurisdiction, that subject being, by the constitution of the Dominion, placed exclusively under the control of the Dominion Parliament. The only Court existing in the Dominion competent to entertain a suit for divorce, and to dissolve the marriage of persons residing in the Province of Quebec is the Court of Parliament of the Dominion of Canada, having its seat at Ottawa, in the Province of Ontario.

By the law of the State of New York it was competent for the plaintiff to institute the said suit instituted by her in the said Supreme Court of the State of New York, although the defendant was then domiciled in the Province of Quebec. No question arises here as to the fact of, or as to the time and place of the committal by the defendant of the adultery charged to have been committed by him; that was a subject which was enquirable, and was enquired into, in the above suit. The summons and complaint of the plaintiff therein was served personally upon the defendant in the City of Montreal, and he appeared to the suit in the said Supreme Court by an attorney of that Court duly appointed by the defendant to appear thereto for him, and such proceedings were thereupon had in the said suit in accordance with the law of the State of New York, that in the month of December, 1880, a decree was made therein whereby the defendant was convicted of having committed the acts of adultery charged against him in the complaint of the plaintiff: and for cause of such adultery it was adjudged by a decree made in the said suit in accordance with the law of the State of New York, that the said marriage between the plaintiff and the said defendant should be, and the same was thereby absolutely dissolved, and by force of that decree the plaintiff is entitled to sue in the courts of the State of New York as if she were sole and unmarried.

Now although the ordinary rule is that the domicile of the wife is the place where her husband has his domicile, yet it is an established exception to this rule in American authority that for the purpose of instituting a suit for divorce the wife may have a domicile separate from that of her husband.

In the case of *Cheever v. Wilson*, 9 Wallace 108, it was decided by the unanimous judgment of the Supreme Court of the United States, that the rule is that the wife may acquire a separate domicile whenever it is necessary or proper that she should do so, that the right springs from the necessity of its exercise, and endures as long as the necessity continues, and that the proceeding for a divorce may be instituted where the wife has her domicile.

In *Harteau v. Harteau* it was said by the Supreme Court of Massachusetts (14 Pick. 181-5) that the law will recognize a wife as having a separate existence and separate interests and separate rights, in those cases where the express object of the proceeding is to show that the relation itself ought to be dissolved or so modified as to establish a separate interest, and especially a separate domicile and home, otherwise the parties would stand upon very unequal grounds, it being in the power of the husband to change his domicile at will, but not in that of the wife.

In *Colrin v. Reed* (5 Smith, Penn., 375-9) it is said "the unity of the person created by the marriage is a legal fiction to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural justice in proceedings which from their nature make them opposite parties."

Mr. Wharton in his work on 'Private International Law' (sec. 46) says: "That the rule that the wife's domicile is that of the husband, it is now conceded on all sides, does not extend to cases in which the wife claims to act, and by law to a certain extent and in certain cases is allowed to act adversely to her husband"; and Mr. Bishop, in his invaluable work upon 'Marriage and Divorce' (Vol. ii. sec. 125) states the rule as collected from the decided cases thus—"When a law authorizes a suit between a husband and his wife for divorce, and makes the juris-

"diction over it depend, among other things, on domicile, there is an irresistible implication that if she needs a separate domicile to give effect to her rights, or if his case requires her to have one to make his effectual, the law has conferred it on her."

In *Deck v. Deck* (2 Swab. & Tr. 91) it has been decided in England that under the provisions of the English statute 20th and 21st Vic., ch. 85, it was competent for the Divorce Court there to entertain a petition for divorce at the suit of an Englishwoman married in England to an Englishman who had left her and gone to the State of New York, where he acquired a domicile, and had married again there, and upon service of process in the suit upon the husband in the United States to make a decree for the dissolution of the marriage.

A similar point decided in *Bond v. Bond* (2 Swab. & Tr. 93), and in *Niboyet v. Niboyet* (4 Pro. & Div. 1) in the case of an Englishwoman who had married a Frenchman at Gibraltar it was decided upon the same statute that the Court had jurisdiction to entertain a petition for divorce presented by the wife, although the husband appeared under protest, and contested the jurisdiction of the Court upon the ground that he had never acquired an English domicile or lost his domicile of origin, and among the exceptions to the general rule that the domicile of the husband is the domicile of the wife, which the above statute creates, Mr. Dicey, in his work on 'Domicile,' states the following:

"1st. The Divorce Court has, under exceptional circumstances, jurisdiction to dissolve a marriage where the parties are, or where one of them is, at the commencement of the proceedings for the divorce resident, though not domiciled in England.

"2nd. The Divorce Court has jurisdiction to dissolve a marriage between parties not domiciled in England at the time of the proceedings for divorce where the defendant has appeared and not under protest.

"3rd. The Divorce Court has jurisdiction to dissolve an English marriage between English subjects on the petition of a wife who is resident, though not domiciled, in England."

Mr. Justice Story, in his 'Conflict of Laws'

(Section 86), says:—"Of the nature, extent and utility of the recognition of foreign laws respecting the state and condition of persons, every nation must judge for itself." Now, admitting this to be so, I must say it appears to me very clear that if the husband in *Deck v. Deck*, instead of going to the State of New York, had gone to the Province of Quebec and had married there, the courts of the provinces of this Dominion should not hesitate to recognise the validity of the decree made in that case, so as to entitle the wife to maintain a suit like the present in her own name as a *femme sole*; and if we should recognize such a decree made by the Divorce Court in England, I can see no principle upon which we should decline to recognize a decree of the Supreme Court of the State of New York, made under similar circumstances, for a cause which, by the law of the State of New York, is sufficient to justify a decree of dissolution of marriage.

In *Meagher v. McAlister* (3 Ir. Chan. Rep. 604), Lord Chancellor Blackburn, in the Irish Court of Chancery, recognizes the validity of a decree of dissolution of marriage made by a Scotch court at the suit of a husband for desertion and non-adherence, in the case of a domiciled Scotchman married in England to an Irishwoman, who, while she and her husband were residing in England, deserted him there, although the cause would have been insufficient to warrant the granting of a decree of divorce by an English court. And the ground of the decision was that the husband having been at the time of the marriage a domiciled Scotchman, the marriage, although solemnized in England, was a Scotch marriage, and that therefore it was competent for the Scotch court to pronounce the decree of dissolution, although the wife had not appeared to the suit.

This judgment is quoted with approbation by the Law Lords in the House of Lords in *Harvey v. Farnie* (L. Rep. 8 App. Cas. 53-60), in which case it was decided that the English courts will recognize as valid the decision of a competent Christian tribunal dissolving a marriage between a domiciled native in the country where such tribunal has jurisdiction and an Englishwoman, when the decree of divorce is not impeached by any species of

collusion or fraud, and this although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.

A fortiori, as it appears to me, should the Decree of the Supreme Court of the State of New York between the parties to the present suit be, upon the principle of the comity of nations, recognized as valid in the Courts of the Provinces of this Dominion, for the marriage between the plaintiff and defendant was in the strictest sense, a New York State marriage. Both parties thereto were natural born citizens of the United States, and domiciled at the time of the marriage in the State of New York, which was also the domicile of origin of the plaintiff and in which she was resident at the time of her filing her petition for divorce and dissolution of marriage in the Supreme Court of the State, and the defendant, though at the time of the presentation of such petition, domiciled in the Province of Quebec, was personally served with the process issued out of the said Supreme Court in the said suit, and appeared thereto absolutely by an attorney of that Court for that purpose duly authorized by the defendant. We may, and in a case of this kind, I think should, refer to the decisions of the Courts of the United States and of the several states, and to the statute law of the particular state in the tribunal of which the decree of dissolution of marriage was made, equally, as we would in a like case in the English Divorce Court refer to the decisions of the English Courts, and to the statute law of England affecting the subject, all countries being equally foreign to the country in the tribunals of which the question arises, in the sense in which that term is applied to questions of domicile and the status of married persons; and so doing we should not in my judgment, hesitate to recognize the decree in the Supreme Court of the State of New York, in the suit instituted by the plaintiff against her husband for adultery, to be valid and binding upon the defendant. There is no suggestion of the decree having been obtained by collusion or fraud, and the parties to that suit having been natural born citizens of the United States, and domiciled in the

State of New York at the time of the marriage, and married under the law of that State, the marriage must be held to have been a New York State marriage, and the parties must be held to have become upon the marriage subject to the law of the State of New York relating to Divorce, by which law it then was, and continually hitherto has been, provided and enacted by statute that a divorce may be decreed and a marriage may be dissolved by the Supreme Court of the State whenever adultery has been committed by any husband or wife, in the following case among others: "Where the marriage has been solemnized or taken place within the state," and that a bill of divorce may be exhibited by the wife in her own name as well as by a husband, and further that if a married woman at the time of exhibiting a bill against her husband *shall reside in this State*, she shall be deemed an inhabitant thereof although her husband may reside elsewhere.

The contention that what this decree purports to effect, namely: Dissolution of marriage, is contrary to the public policy of the Province of Quebec, and that therefore it should not be recognized, cannot prevail, for although the Province of Quebec has no tribunal established within its limits competent to entertain questions of Divorce, and cannot by its constitution establish [such a court, yet that is because of the nature of its constitution, and because the subject of divorce is placed under the exclusive jurisdiction of the Dominion Parliament, which can establish such a court competent to entertain all cases of divorce arising in all the Provinces, and in the mean time, until it does, exercises itself jurisdiction over the subject *as a court*, for the same cause as by the law of the State of New York is deemed sufficient there, and in the same manner as the Imperial Parliament did in England prior to the establishment of the Divorce Court there. That cannot be said to be against the public policy of the Province of this Dominion, which the Province by its constitution has not, but the Dominion has power to deal with, neither can it with any propriety be said that the Province has any interest in refusing which would justify its courts in refus-

ing to recognize the validity of the decree. The language of Lord Selborne in *Harvey v. Farnie* appears to me to be very appropriate to the present case, to the effect that so far as the question of recognition depends upon any principle, it must be upon the principle of recognizing the law of the forum in which the decree is made, and of the matrimonial domicile when, as in this case, they both concur. I am of opinion, therefore, that the validity of the decree should be recognized in the several courts of the Provinces of this Dominion. That upon one side of the line of 45° of latitude the plaintiff and defendant should be held to be unmarried persons with all the incidents of their being sole and unmarried, and that upon the other side of the same line they should be held to be man and wife is a result so inconvenient, injurious, and mischievous and fraught with such confusion and such serious consequences that, in my judgment, no tribunal not under a pre-emptory obligation so to hold, should do so. Such a decision would, in my opinion, have the effect of doing great violence to that *comitas inter gentes* which should be assiduously cultivated by all neighbouring nations, especially by nations whose laws are so similar and derived from the same fountain of justice and equity as are those of the State of New York and of Canada, and between whom such constant intercourse and such friendly relations exist as do exist between the United States of America and this Dominion.

But, I am of opinion, that for the purpose of the present appeal it is sufficient to hold that the defendant having appeared to the suit, which, as appears by the evidence, the Supreme Court of the State of New York had jurisdiction to entertain, he should not be permitted in the present suit indirectly to call in question the validity of a decree made in a suit to which he appeared absolutely, and not under protest. This is a position, which, in my opinion, is not only warranted on principle, but on the authority of decided cases—*Zychlinski v. Zychlinski* (2 Swab. & Tr. 420); *Calwell v. Calwell* (3 Swab. & Tr. 259); *Reynolds v. Fenton* (3 C. B. 187), and other cases.

The appeal should, therefore, in my opinion, be allowed with costs, and the case remitted to the Superior Court of the Province of Quebec

to be proceeded with. I have thought it due to the able argument presented to us by the learned counsel upon both sides to express my opinion upon the above point which was so fully and with great propriety dwelt upon as the main point in the case, but I concur also in the judgment of my brother Fournier and in the reasoning upon which he has supported it.

HENRY, J.—The appellant and respondent are natural born citizens of the United States of America, and in the month of May, 1871, being residents of and domiciled in the State of New York, were married in the city of New York according to the laws of that state.

The appellant, at the time of her marriage, was the owner in her own right of money, securities, and other personal property amounting to about \$220,000, which by the law of that state continued after her marriage to be her separate property, uncontrolled by her husband, as fully as before her marriage.

After her marriage, the securities and property owned by her were by her given to the respondent as her agent and trustee. In 1872 they moved to Montreal, where the respondent has since resided. The appellant resided with him there until the month of October, 1876, when she abandoned her domicile there on account of the improper conduct of her husband, and returned to New York, her original domicile, to live with her mother.

In 1880 the appellant, then residing in the city of New York, commenced an action in the Supreme Court of that state against the respondent, for the purpose of obtaining a divorce *a vinculo matrimonii* and dissolution of her said marriage, on the ground of the adultery of the respondent.

There was no court in the Province of Quebec that had jurisdiction in the matter of divorce, but the Parliament of Canada had and has power to deal with such a matter.

In 1880, when the appellant took the proceedings for divorce in New York, she might have obtained the desired result by an application to the Dominion Parliament, as many others have done. By the law of the State of New York the Supreme Court of that State had jurisdiction to deal with the subject

matter of the appellant's suit, although the respondent at the time resided in Montreal. The summons and complaint were duly served on him personally at Montreal, and he appeared by an attorney of the court out of which the summons and complaint were issued and filed, specially appointed for that purpose. The charge of adultery was proved, and a decree of the court was duly made by which the marriage of the parties was dissolved. It was satisfactorily shown that after that decree was made the appellant was authorized to commence and prosecute actions in her own name, in the State of New York, in the same manner as if she had always been a *femme sole* and unmarried, and that her property in her husband's hands was under her sole control.

The general rule is, that the domicile of the husband is that of his wife, but in England and in the United States the domicile of the husband is not necessarily that of the wife, when she is seeking by legal means to have their marriage dissolved. The appellant was a natural born subject of the United States, and so was her husband.

They were married in New York, where their domicile then was. By the law of that state, the court had full jurisdiction over the subject matter of the divorce applied for by the appellant, and the decree of the court duly dissolved the marriage. I consider, therefore, that by the comity of nations respect must be paid to a legal decision and judgment of a foreign court shown to have had jurisdiction over the parties, and the subject litigated by them and adjudicated upon.

In England there are cases to sustain that proposition, and many in the United States. When the respondent appeared to the suit, and submitted to the jurisdiction of the court, I cannot conceive what difference it makes where he then resided, and the jurisdiction of the court I take it would be the same as if he then resided in New York. His appearance would not of itself give the court jurisdiction if it had it not otherwise; but by the law of New York the court had jurisdiction without such appearance, if the necessary service of process were made according to the laws and rules prevailing in such cases.

In the absence of such appearance the court would, no doubt, decide upon the sufficiency of the service before passing a decree, and in such a case we should assume that such had been done. If the respondent, when served with the summons and complaint in question, expected any legal benefit from the fact of his domicile being then in Montreal, he should then have contested the right of the court in New York to deal with the matter. After appearance and defence, I think his objection is too late.

It was contended that because in the Province of Quebec there is no law by which a marriage could be dissolved, the Courts in that Province cannot give effect to a decree of a Court in the United States for the dissolution of a marriage, even where the latter Court had full jurisdiction.

The same objection might be raised to the dissolution of a marriage by the Parliament of the Dominion, and it would apply equally well to the one as to the other.

Suppose that such a decree had been made in England, where the parties had been born and were domiciled when married in that country, and they had removed to and lived in Montreal, as the parties in this case did: that the wife subsequently returned to where she had been born, and married, and proceeded in the Divorce Court of that country for a dissolution of the marriage, and obtained a decree dissolving it, could it be said that the parties continued to be man and wife in the Province of Quebec because of the absence in the latter of judicial jurisdiction for the same purpose, while in England and elsewhere they held no longer such relations? If not, why should not a decree duly made in New York or any other country having the necessary jurisdiction in such cases have the same result and value?

We are not trying whether there is in the Province of Quebec jurisdiction to try and adjudicate upon such a case, or whether, if there is not, there should be; but whether in some other country a court properly constituted, and having jurisdiction according to the law of that country over the parties and cause of action, has made a valid decree dissolving a marriage. Such is the governing rule in England and in the United States,

and in my opinion it should be the same here.

In such a case no authority to commence the present action was necessary. In ordinary cases, a married woman in the Province of Quebec requires authority, either from her husband or a judge to appear in Court or commence legal proceedings, but I don't think such a provision is applicable when the wife takes proceedings against her own husband to account for his administration of her estate. The wife could hardly be required to obtain authority from her husband to sue himself. In this case the respondent administered the appellant's property and estate, and she is but calling upon him to account as she would any other agent, and I think that it being a case of administration, the rule requiring authority to sue does not apply to it.

I am of opinion that the judgment below should be reversed and judgment entered for the appellant, with costs.

(To be Continued.)

RECENT DECISIONS AT QUEBEC.

Faute—Dommage.—Jugé, que le fait, de la part de la corporation de Québec, de laisser ouvert à la circulation l'espace environnant l'ouverture d'un passage souterrain, sans protéger le public au moyen d'une balustrade ou autrement, constitue une négligence et une faute de la part de la corporation, et qu'en conséquence elle est responsable pour les dommages résultant de cette négligence ou faute.—*Brault v. La Corporation de Québec (en Révision)*, 10 L. R. Q. 291.

Nantissement—Gage—Tradition Symbolique. *Jugé*, 1. Que la remise, par le débiteur à son créancier, d'une reconnaissance écrite, dans laquelle il déclare tenir à la disposition de ce créancier des marchandises contenues dans un entrepôt appartenant au débiteur, transfère au créancier un droit de gage sur ces marchandises.

2. Que cette remise est une tradition symbolique qui constitue le créancier en possession légale des dites marchandises, sans qu'une livraison en nature soit nécessaire.—*Ross v. Thompson et al.* (Cour de Révision, Stuart et Routhier, JJ.; Caron, J., diss.), 10 Q. L. R. 308.

The Legal News.

VOL. VIII. FEBRUARY 14, 1885. No. 7.

The text of the decision of the Privy Council in *Attorney General & Reed* has been received, and we report the case in the present issue. The observations of the Lord Chancellor, who delivered the judgment of the Committee, are brief, but, so far as they extend, they do not appear to support the majority judgment of the Court of Appeal in the Provincial Tax cases. Their lordships adopt, or at least favor, Mr. Mills' definition of direct and indirect taxation. And as to local powers of taxation for local objects, although they do not attempt to define particularly the meaning of sub-section 16 of section 92, B.N.A. Act, their lordships indicate a mode of interpretation which seems to differ essentially from that laid down by the majority of the Court of Appeal in the recent decision.

The oath question came up in a new form a few days ago in Illinois. It appears that a religious society exists in that State known as the Beakmanites, or followers of the teachings of one Dora Beakman. Some of the members of this society, being called as witnesses in a suit, refused to take an oath or to affirm, declaring that their religious belief prohibited their doing either—citing 5th Matthew, verses 34-37: "Swear not at all, neither by heaven," etc. The minister of the society, who was present, being asked whether, as regards being witnesses, there was any recognized form or ceremony known to their sect, replied, "None whatever; we believe it sinful either to swear or to affirm." *The Court*: "You believe in the existence of a God?" *Ans.*: "We do." *The Court*: "And in a future existence?" *Ans.*: "Certainly." *The Court*: "Also in punishment here or hereafter for not speaking the truth when called upon to do so as a witness?" *Ans.*: "We believe in both, in punishment both here and hereafter for such a sin." Thereupon the witness was asked, "Do you, in the presence of Almighty God, solemnly state that you will speak the

truth, and that you believe that if you do not you will be punished both in this world and in the world to come?" To which the witness answered, "I do," and was permitted to testify in the case. If the above is not an affirmation, it would be interesting to know what the witness' idea of an affirmation was.

Mr. Landry, the member for Montmagny, has introduced at an early stage of the session, his bill intitled: "Acte à l'effet de restreindre la juridiction d'appel de la Cour Suprême." Being asked for explanations the hon. member said the bill would explain itself: "Comme le titre l'indique il s'agit de restreindre la juridiction de la Cour Suprême dans les matières qui regardent les lois civiles des différentes provinces; le but de cette loi est de soustraire ces causes-là à la juridiction de la Cour Suprême. Si le gouvernement a une mesure à proposer sur ce sujet qui soit plus propice que la mienne et qui rencontre nos vues, je n'ai pas d'objection qu'elle soit substituée à mon bill; mais s'il n'en propose aucune, j'ai l'intention de demander le vote de cette Chambre."

The *London Law Journal*, referring to Mr. Frederick Pollock's new *Law Quarterly Review*, says: "By an unreasonable prejudice English lawyers are apt to look upon jurists as persons knowing a little law of every country except their own, and to leave their productions unread." This prejudice, we are sorry to say, is not confined to the lawyers of the metropolis. We are acquainted with a few whose colonial experience has not broadened their vision, and whose highest ambition is to be informed as to what the Courts before whom they practice have actually decided.

FOREIGN COPYRIGHT.

The following is a head-note which appears in the twenty-first volume of the Federal Reports to the case of *Estes v. Williams*, a decision of Mr. Justice Wheeler delivered on July 31 last, in the Circuit Court of the Southern District of New York, which is of the deepest interest and importance to English writers and publishers:—

COPYRIGHT—FOREIGN PUBLISHER—AMERICAN ASSIGNEE—USE OF A NAME—RIGHT OF ACTION.—The publisher

of 'Chatterbox,' in England, having assigned the exclusive right to use and protect that name in this country, the assignee may maintain his action against any other person who undertakes to publish books under that name in the United States. *Jollie v. Jaques*, 1 Blatch. 618; *M'Lean v. Fleming*, 96 U.S. 245 cited.

The word 'undertakes' is evidently used in the Transatlantic sense of 'holds himself out.' If this decision be upheld, the position of English authors in the United States will be much improved, as they can assign the right to use the title of a book to an American publisher who will then have an exclusive right to publish a book under that title. It is true that the American publisher will not obtain a copyright, but he will obtain something very valuable—namely, the exclusive right to sell a literary production under its right title and the name of its author. There is nothing in the present decision to prevent the book called 'Chatterbox' being published word for word, but it must be published without the title, and, as seems inevitably to follow from the decision, without the author's name. People who would buy 'Chatterbox' with the author's name would probably not buy the same book, under the title say of 'Magpie,' without the author's name, and there would be something contraband about the latter book. The decisions in England on the names of books, such as *Dicks v. Yates*, 50 Law J. Rep. Chanc. 809, in so far as they may be adverse to *Entes v. Williams*, may well be distinguished from it. Those decisions refer to cases in which a new book is published under an old title, but this is a case in which the same book is published under the same title. Although there may be no copyright in the book, the fact that the book is a plagiarism cannot be disregarded in considering whether the assignee of a title which is put in the position of a trade-mark is substantially damaged by some one else using the title.—*Law Journal*, (London.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, NOV. 26, 1884.

Before THE LORD CHANCELLOR, LORD FITZGERALD, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

THE ATTORNEY-GENERAL FOR QUEBEC (Intervenant below) Appellant, and REED (Plaintiff below) Respondent.

B. N. A. Act, 1867—Powers of Provincial Legislatures—44 Vic. (Q.) cap. 9—Direct and Indirect Taxation—Fee on filing Exhibit.

1. *The best general rule in determining whether a tax is direct or indirect is to look to the time of payment: if at that time the ultimate incidence of the tax is uncertain, it is not direct taxation within the meaning of the 2nd Sub-section of Sect. 92, B. N. A. Act. The ultimate incidence of the tax imposed by the Provincial Act 44 Vic. (Q.) c. 9, being uncertain at the time of payment, it falls under the denomination of indirect taxation.*
2. *The Act imposing the tax does not relate to the administration of justice in the Province within the meaning of Sub-sect. 14 of Sect. 92, B. N. A. Act.*
3. *The Act imposing the tax cannot be justified under Sect. 65, B. N. A. Act.*

The appeal was from an order of the Supreme Court of Canada of the 18th of June, 1883, reversing a judgment of the Court of Queen's Bench of the Province of Quebec, of the 24th November, 1882 (5 L.N. 397), and restoring a judgment of the Superior Court, Montreal (5 L.N. 101), of the 10th of March, 1882, which declared that a certain duty of ten cents imposed by an Act of the Legislature of the Province of Quebec (43 & 44 Vic., c. 9), on every exhibit produced in court in any action depending therein, was not warranted by law, the Act being *ultra vires* of the Legislature of that province.

The substantial question involved in the appeal was whether the duty of ten cents on exhibits produced in court in any action depending in any court of the Province of Quebec, and which duty was imposed by the Quebec Act, 43 & 44 Vic., c. 9, was within the power of that Legislature to impose under any of the following alternatives, viz.:—[1] Under the express power of that provincial legislature to make laws given by the British North America Act, 1867, as being "direct taxation" within the meaning of those words as therein employed; [2] Under sec. 92, ss. 14 of that Act as relating to "the administration of justice in the provinces, including the

constitution, maintenance, and organisation of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts; [3] Under a further sub-section as being a matter of a "merely local or private nature" in the province; [4] Under the reservation given by the Act to the Provinces of Ontario and Quebec jointly of the building and jury fund, Lower Canada; [5] Under the provision of the Act as being an alteration of a law in force in the former province of Canada at the union of the provinces into the Dominion; [6] As being the exercise of a power, authority, or function, exercisable in such former province of Canada at such union; or, [7] As an inherent right or power in the provincial legislature of which it had not been deprived by the Imperial Act either by express words or by any necessary implication.

The matter arose out of an action in the Superior Court of Quebec, wherein the respondent, Reed, was plaintiff, and Roy and another were defendants. The respondent tendered a promissory note to be filed as an exhibit in support of his action by the prothonotary of the court, whereon the prothonotary refused to receive or file the note as an exhibit unless there were affixed to it a law stamp of ten cents in payment of the duty imposed on the filing of such exhibit by the Act of Quebec, 44 Vic, c. 9. The respondent obtained from the Superior Court a rule calling upon the prothonotary to show cause why he should not receive and file the exhibit as tendered without having the stamp affixed. The Attorney-General for the province intervened in the matter, and on the 10th of March, 1882, Mr. Justice Mackay, before whom the matter was argued, delivered judgment, making the rule absolute and dismissing the intervention of the Attorney-General with costs. The Attorney-General appealed to the Court of Queen's Bench, who, by a majority of four judges to one (the Chief Justice), reversed the decision of Mr. Justice Mackay and quashed the rule. The respondent took the matter on appeal to the Supreme Court, who, by a majority of four judges to two, set aside the judgment of the Queen's Bench, and restored the original

decision in favour of the respondent. From that judgment the present appeal was preferred.

Horace Davey, Q.C., Globensky, Q.C. (of the Montreal Bar), and *Pollard*, for the Appellant.

The Respondent was not represented.

The LORD CHANCELLOR delivered judgment as follows:—

Their Lordships have considered the argument which they have heard, and they have come to the conclusion that the judgment appealed from must be affirmed.

The points to be considered are three: first of all, can this charge upon exhibits used in the courts of justice of the province be justified under the 2nd sub-section of clause 92 of the British North America Act? Is it a case of direct taxation within the province "in order to the raising of a revenue for provincial purposes?" What is the meaning of the words "direct taxation."

Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the appellant's argument than the other view, that of Mr. McCulloch and M. Littre. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Well now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be

paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings, until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character the person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character the person who pays it is a litigant, expecting or hoping for success in the suit; and whether he or his adversary will have to pay it in the end, must depend upon the ultimate termination of the controversy between them. The Legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else. Therefore it cannot be a tax demanded "from the very persons who it is intended or "desired should pay it;" for in truth that is a matter of absolute indifference to the intention of the Legislature. And, on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to

look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd sub-section of the 92nd clause of the Act in question. Still less can it be called so, if the other view, that of Mr. McCulloch, is correct.

That point, which is the main point, and was felt to be so by Mr. Davey in his very able and clear argument, being disposed of, the next question, upon the terms of the same section of the same Act, is that which arises under sub-section 14. One of the things which are to be within the powers of the Provincial Legislatures—within their exclusive powers—is the administration of justice in the province, including the constitution, maintenance, and organization of Provincial Courts, and including the procedure in civil matters in the Courts. Now it is not necessary for their Lordships to determine whether, if a special fund had been created by a Provincial Act for the maintenance of the administration of justice in the provincial courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the Province; it does not provide in any way, directly or indirectly, for the maintenance of the Provincial Courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation indeed is a matter of procedure in the Provincial Courts, but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the second sub-section; it is made part of the general consolidated revenue of the province. It therefore is precisely within the words "taxation in order to the raising of a revenue for provincial purposes." If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of

justice than any other part of the general provincial revenue.

Their Lordships, therefore, think that it cannot be justified under the 14th sub-section.

With regard to the third argument, which was founded on the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the pre-existing powers of the Governors or Lieutenant-Governors in Council to do certain things, not there specified. That, however, was subject to a power of abolition or alteration by the respective Legislatures of Ontario and Quebec, with the exception, of course, of what depended on Imperial Legislation. Whatever powers of that kind existed, the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that, among those powers, there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the Courts, not for the general revenue purposes of the province, but for the purpose of forming a special fund called "the Building and Jury Fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not by the authority of the Lieutenant-Governor in Council. It is not in aid of the Building and Jury Fund. It is a Legislative Act without any reference whatever to those powers, if they still exist, quite collateral to them; and, if they still exist, and if it exists itself, capable of being exercised concurrently with them; to tax, for the general purposes of the province, and in aid of the general revenue, these legal proceedings.

It appears to their Lordships that, unless it can be justified under the 92nd section of the British North America Act, it cannot be justified under the 65th.

Their Lordships must, therefore, humbly advise Her Majesty to dismiss this appeal.

SUPREME COURT OF CANADA.

STEVENS, Appellant, and FISK, Respondent.

(Continued from p. 48.)

FOURNIER, J. (concurring in the judgment of the Court):—This action was brought by the appellant as the divorced wife of the re-

spondent, in order to obtain from the latter an account of the personal fortune she brought him at her marriage, and which she had given him to manage and administer.

The parties were married in May, 1871, in the State of New York, where they had their domicile. In 1872 they both came to Canada, with the intention of permanently fixing their residence in the city of Montreal where, since that time, both parties have been domiciled (until 1876). The appellant then left her husband to return to the United States. The parties not having made an ante-nuptial contract, they must be presumed to have intended to subject themselves to the general law of the State of New York, which declares that in such a case there is no community of property between husband and wife, and that the wife remains the sole and exclusive owner of her property and continues to exercise her rights over the same as if she were a *femme sole*.

It appears that at the time of her marriage the appellant had moveable property in her own right amounting to \$220,775.74, which she received from her trustees on or about the 8th January, 1872, and that she thereupon placed this fortune in the hands of the respondent, who administered and controlled it until the 25th day of September, 1876, at which date, being dissatisfied with her husband's administration, she demanded the return of her securities and an account of his administration.

Respondent returned her only a small portion of it, and refused to account for the balance, which he still withholds. In December, 1880, at the request of the appellant, the Supreme Court of New York decreed a divorce in her favour. Believing the marriage tie to have been dissolved, and that she had the control over her property as if she had never been married, she (the appellant) brought the present action without having previously obtained any authorization from a judge. To this action the respondent pleaded: first, by a demurrer which was overruled; second, by a plea to the merits alleging that long before the divorce relied on by the appellant, the parties had acquired a new domicile in the Province of Quebec, and therefore the divorce was null and void; and thirdly, that

the plaintiff was not authorized to institute the present action.

By a special answer to the respondent's plea, the appellant reiterated the allegation of the validity of the divorce obtained in the New York Supreme Court, and stated further that even if the divorce were invalid, she would nevertheless have a right to demand from respondent an account of his gestion of her fortune, both under the law of New York and of the Province of Quebec.

There are several important questions raised under this issue, and which are submitted as follows in the appellant's factum :

"The appellant, even if she be still the wife of the respondent, can institute the present action without authorization.

"The want of authorization, even if fatal, has been badly pleaded.

"If authorization was necessary, the Court should not have dismissed the action, but should have authorized the wife *séance tenante*, or, at least, sent back the record to the Court below to enable plaintiff to get the necessary authorization.

"The divorce alleged in the declaration is good and valid, and entitled to recognition in this province; and its pretended invalidity cannot, in any event, be set up by the respondent."

If the first proposition propounded by the appellant is good in law, it is evident, that for the purpose of determining this suit, it is not necessary to inquire into the other questions submitted.

The first question therefore is: Could appellant, under the circumstances, bring the present action without any previous authorization, even supposing that the decree of the New York Supreme Court granting a divorce is not binding here? The majority of the Court of Queen's Bench have answered this question in the negative.

The judgment of the Court of Queen's Bench is based upon the provisions contained in the articles of the Civil Code relating to the rights and status of persons, commencing with the third paragraph of Art. 6, which enacts:—"The laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there; subject as to the latter to the exception mentioned

"at the end of the present article," and upon the fact that the parties having abandoned their domicile in New York, with the intention of fixing themselves in Montreal and acquiring a new domicile, the laws of the Province of Quebec must govern their status and capacity. The Court also relied on articles 176 and 178, which forbid married women to appear in judicial proceedings without the husband or his authorization or that of a judge, as well as on article 183, which enacts that "the want of authorization by the husband, where it is necessary, constitutes a cause of nullity, which nothing can cover," etc., etc. And upon these articles, and the authorities cited by the learned judges in their opinions, they arrived at the conclusion that the present appellant had no right to bring the present action without having previously obtained the authorization of a judge.

I do not intend to discuss the correctness of the propositions they laid down in order to arrive at the conclusion they did. I will be permitted, however, to say, that I do not admit that they are applicable in the general and absolute form in which they are laid down in the judgment of the Court. Then I am led to inquire if, without considering the general law as to the status and capacity of a foreigner in this province, there is not in his favour some exception or legislative provision which will dispense the appellant from the obligation of first obtaining the authorization of her husband or of the Court in order to bring the present action.

As already stated, the appellant was married under a system of law which recognizes to a married woman, married without any ante-nuptial contract, the absolute right of disposing of her property independently of all control by the husband. The law of the State of New York has been set up and proved in the most positive manner. The testimony of Sidney F. Shelbourne, a barrister of the State of New York, is so clear and precise on this important point, that I will quote it at length:—"Will you state to the Court what is the law of the State of New York regarding proprietary rights of consorts who were married on the seventh of May, eighteen hundred and seventy-one (1871).

"A. The laws of the State of New York since the year 1848 down to the present time with reference to the separate property of the wife, which she has at the time of her marriage, have been that such property is entirely separate and free from the control of her husband. It does not enter into the community. She has absolute control over it, and the power to dispose of it, and to alienate it without any control on the part of her husband.

"Q. That is when there is no ante-nuptial contract?

"A. Yes; she is just the same as if she were a *femme sole* with regard to such property; there is no conjugal partnership."

It is clear from this evidence that according to the law in the State of New York, the appellant, even during the continuation of her marriage, could, without any authorization whatever, have instituted the present action in her own country, and that she could still have that right if her husband could be summoned within the jurisdiction of the State of New York.

The fact being established that in the State of New York the appellant could have sued her husband without any previous authorization, as she did in this case, there remains to consider the question whether under such a state of facts, the laws of the Province of Quebec do not dispense the appellant with the necessity of first obtaining her husband's authorization before suing. I have not the slightest hesitation in stating that in my opinion this question must be answered in the affirmative, being clearly settled by the third paragraph of Art. 14 of the Code of Procedure, which declares that: "All foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings, may do so before any court in Lower Canada." Now this article, based on chap. 91 of the Consolidated Statutes of Lower Canada, has given to strangers in a general way the same rights (as are recognized and given to them by sec. 2 of the Con. Stats.) of suing (*ester en jugement*) when they have that power or right in their own country. The section in the statute being more explicit and positive than the article of our

code, I will quote it at length; chap. 91, C. S. L. C., sec. 2:—

"All joint stock or other companies or bodies politic or corporate, who have a legal capacity in the jurisdiction wherein they were respectively erected or recognized, and all persons on whom by any properly constituted authority or law (whether of the heretofore Province of Upper Canada, or of the Imperial Parliament of Great Britain and Ireland, or of the United States of America, or of any of them, or of any other foreign state, colony or dominion,) the right or power of suing or being sued has been conferred, shall have the like capacity in Lower Canada to bring and defend all actions, suits, complaints, bills and proceedings whatsoever, and shall, by and before all courts, judges, and judicial authorities whatever in Lower Canada, be held in law to be capable of suing and being sued, in the same name, manner and way as they could or might respectively be within the jurisdiction wherein such executors or administrators or persons, bodies politic and corporate, joint stock companies or associations of persons were respectively created, erected or recognized."

This provision is couched in the very same words as sec. 2, cap. 6, 22 Vic. (1858).

The words are very general and apply to all persons on whom by any properly constituted authority or law, the right or power of suing has been conferred, and gives them the power of exercising the same right in Lower Canada. Though domiciled in the Province of Quebec, the appellant never changed her nationality, she is still a foreigner, never having lost the quality of an American citizen.

Now, according to the law of the State of New York, the appellant, having been married without having made an ante-nuptial contract, is entitled to manage her property as if she were not married, and is consequently entitled here by said article 14 to take her present action just as if she were a *femme sole* with regard to said property. Considering the question settled by the effect of Article 14 of C. C. P. it is not necessary for me to determine

whether or not in the absence of that article the present appellant, under the laws of the Province of Quebec relating to marital power, could exercise in this country the right she had in her own country to sue as a *femme sole*. But admitting, for the sake of argument, that in such a case she would not be entitled to sue as a *femme sole*, it seems to me that by the enactment of article 14 recognizing (as it does as to the right to sue) the personal status of a foreigner to be the same in this country as in his own, the Legislature has at least declared that the laws of the Province concerning marital power as interpreted by the Court below, shall not apply to persons situated as the present appellant is. Therefore she can sue for the revendication of her property.

It seems to me that article 14 settles the point in favour of the appellant so clearly that I need scarcely refer to any other authorities. I shall, however, cite one in order to show that jurisprudence in France is in accord with the law as laid down in our code of procedure. See *Sirey* (Codes-Annotés, Art. 215, 1875.) "A foreign married woman in order to sue in France need not previously obtain her husband's authorisation, if in her own country such authorisation is not necessary." 16 Fév. 1844.

It is the result of the principle recognized by all authors that the necessity of an authorisation depends upon the personal status, 1 Fœlix, Dr. Int., p. 117, No. 65, et Massé, Dr. Com., t. 2, No. 63.

For these reasons I am of opinion that the judgment of the Court of Queen's Bench should be reversed, and the judgment of the Superior Court ordering an account to be rendered should be restored with costs.

RECENT DECISIONS AT QUEBEC.

Ship—Necessaries.—A ship having brought out a cargo of coal, the master, in order to enable her to take a cargo of wheat on her return voyage, employed the promoter as a ship-liner to fit her for that purpose.—*Held*, that such lining comes under the term "necessaries" in the Imperial Act, 28 Vict., c. 24, s. 10, § 10.—*The Glendevon* (Vice-Admiralty Court; McCord, Deputy Judge), 10 Q. L. R. 295.

Ship—Collision—Look-out—Fog-horn—Sailing Regulations.—A steamer proceeding at "easy" speed, on a thick and foggy night, ran down a schooner lying at anchor on a fishing ground. The latter had a bright light burning and a fog-horn blowing, and at sound of the steamer's whistle, some minutes before the collision, a flash-light or "flare-up" was exhibited, and muskets fired, which were heard on the steamer. *Held*, that the steamer must be condemned for not keeping a sufficient look-out, notwithstanding the schooner's infraction of the law in sounding a fog-horn instead of ringing a bell, it appearing that this had not contributed to the accident.—*Lohnes et al. v. SS. Barcelona* (Vice-Admiralty Court, Irvine, J.), 10 Q. L. R. 305.

RECENT ENGLISH DECISIONS.

False pretences.—On an indictment for obtaining goods by false pretences, the false pretence charged and proved being that the prisoner was daughter of a lady of the same name residing at a certain place, there being no evidence that the goods were not delivered to the prisoner before her name and address were asked for, *held*, that there was no sufficient evidence to sustain the indictment, it being essential on a prosecution for obtaining goods by false pretences to prove that the goods were delivered on the faith of the false pretence charged.—*Reg. v. Catherine Jones*; 50 L. T. Rep. [N.S.] 726.

GENERAL NOTES.

The *Central Law Journal* (St. Louis, Mo.) notes a peculiar specimen of indexing in the Ontario Statutes; but in the same issue of our esteemed contemporary is to be found the following index line: "*Valenti non fit injuria*." This rather startling doctrine is perhaps specially applicable in Missouri. Freely translated it may read that "a man well equipped with six shooters can walk about in safety."

A curious form of contempt of Parliament is before the Senate at Ottawa. One of the honourable senators (Mr. Alexander) has given notice, "that he will call the attention of the House to the fact of a Speaker's portrait having been placed in the corridors, calculated, from the enormity of its dimensions, and from its want of uniformity with those of all the former Speakers, to bring this branch of the Legislature into public derision."

We have received Vol. I No. 1 of the 'Montreal Law Reports,' published by the Gazette Printing Company, and edited by the editor of the *Montreal Legal News*, assisted by two learned advocates, one for the Superior Court series and the other for the Queen's Bench series. Nineteen cases in all are reported, some half of which are given in French and the rest in English. The reporting appears to be well and concisely done.—*Law Journal*, (London).

The Legal News.

VOL. VIII. FEBRUARY 21, 1885. No. 8.

Chief Justice Wade, of Montana, has recently had occasion to vary the monotony of writing judicial opinions by inditing a pleasant description of an attack on a stage coach by masked men, in which he played an involuntary part. The robbers, it appears, did not encounter a very spirited resistance, probably because the travellers had not much to lose. "How anxious we were," says the Chief Justice, "to give up our money and watches, and have the entertainment over. It is amazing how very liberal we all became. We were just aching to give up our valuables. We waited patiently to be killed if that was in the programme, and after waiting for what seemed about nine years, but in fact perhaps ten minutes, one of the masked fellows, who seemed to be in command, and who stood like a statue, said: 'Get into the coach. Be quick about it. Don't look back, and drive like hell.' Some of us hesitated about getting into the coach before we had been robbed. We thought we were entitled to have the regulation programme carried out in full. But a motion from one of the maskers with his gun persuaded us to obey the order, and we got on board, and the driver put the horses to such speed, that I began to think the terrors of road-agents were more endurable than those of a driver attempting to obey such an order. A moment after we started we heard the report of eight or ten guns, crack! crack! and we supposed a load of passengers by another conveyance had been fired into. The firing came about in this way. The sheriff of an adjoining county and another man in a buggy were coming to court, and the sheriff, who had a Winchester with him, discovered one of our masked men behind a rock, and sprang from his buggy and demanded of him what he was doing there, whereupon a bullet went tearing through the sheriff's coat from another direction, but he stood his ground like a rock and

returned the fire, and thinks he killed or wounded one or more of his assailants. We came on to town not more than six miles away, and the sheriff of this county and the other sheriff with a company of armed men immediately started in pursuit of the ruffians, but have not yet captured them. If they succeed I shall have the pleasure of sending them to the penitentiary."

With reference to the punishment of dynamiters the *Law Journal* (London) remarks:—"The suggestion that the outrage at the Tower of London is punishable under 12 Geo. III. c. 24 is worth consideration. That Act makes it, amongst other things, an offence punishable with death 'wilfully and maliciously to set on fire, burn, or otherwise destroy, any of Her Majesty's military, naval, or victualling stores or other ammunition of war, or any place where any such military, naval, or victualling stores or other ammunition of war is kept.' If the words 'or other ammunition of war' be omitted, it is clear that the Tower is a place where military stores are kept; but as these words are used, and deal with the kind of case in question, the general words preceding must, by a well-known rule of interpretation, be taken to be limited by the special words. Are, then, the rifles kept at the Tower 'ammunition of war'? In the sense given to the word in the Queen's service, which includes 'ammunition boots' and the whole equipment of the soldier, it undoubtedly includes rifles. Equally without doubt the word 'ammunition' in the popular sense means only powder and shot in all their forms. The act must, we think, be construed in the popular sense, especially as there is the phrase 'munitions of war,' which is in popular literature used very much in the sense in which ammunition is used in the service. The same Act applies to burning or destroying 'any of Her Majesty's arsenals,' but the White Tower, which consists of a chapel, a museum, and a banqueting-hall used for storing arms, can hardly be said to be an arsenal; still less can the Tower itself. Again, although the rifles, if 'ammunition,' may have been destroyed, was the White Tower either 'set on fire, burnt, or otherwise destroyed'? It was neither destroyed nor

burnt, and there is some doubt as to its being set on fire. In view of these difficulties, and the inconvenience of drawing a distinction between the Tower and other buildings, the right course appears to be to indict for high treason. The blowing-up of buildings with the object of influencing the Government is an act of war, and amounts to high treason. This was decided in June, 1883, by the Lord Chief Justice, the Master of the Rolls, and Mr. Justice Grove, at the Central Criminal Court, in *Regina v. Gallagher*."

THE ATTORNEY-GENERAL OF QUEBEC & REED.

Lord Selborne's opinions have one great merit—that of being clear. Whether one agrees with the conclusion at which he arrives or not, there is no confusion as to what that conclusion is, or the process of reasoning he has followed. In the case before us the Privy Council has decided three things:—1. That the ten cent tax is an indirect tax; 2. That it is not specifically imposed for the maintenance of the courts of justice; and 3. That it is not the exercise of any power under Section 65 of the B. N. A. Act. It is therefore *ultra vires*.

On the first point, which is called "the main point," there is really no room for doubt "within the meaning of the 2nd sub-section of the 92nd clause of the Act in question." But Lord Selborne thought it necessary to explain the "divergence of view" among the writers, whom Mr. Justice Taschereau once thought were all of one mind with him on the point.

The second point, according to Lord Selborne's view of the case, is that the 14th sub-section of section 92 affected the question. I am not aware that any one in the Court of Queen's Bench put forth the pretension that sub-section 14, taken by itself, authorised the tax. Here is what was said on this matter:—"Sub-sections 14 and '16 give the right to the Legislature of the Province to pass the law in question. In proceeding to explain this proposition, it is proper to make two preliminary remarks: "First, that the power of the local governments to tax is nowhere confined to licenses "and to direct taxation, as has been assumed.

"They are specially permitted to impose "these taxes, that is all; but this differs "essentially from a prohibition to impose "any other taxes. Secondly, the sub-sections "of section 92 must be read with the general "heading to avoid misconception."

From this starting point four questions were put:—

"(1) Is not the law impugned a law for "the maintenance of justice in the Province; "nay, more, a law modelled on the law existing at Confederation for its maintenance?

"(2) Is this tax for the performance of "a duty by a local functionary not a matter "of a merely local nature in this Province?

"(3) Does it conflict with any Dominion "power?

"(4) Can it be contended for an instant that "the power to raise money by any mode or "system of taxation can be held to signify "that the Dominion Parliament could raise "money on the duties to be performed by "local officers?"

Only the first of these questions is met by the report of the Privy Council. Their Lordships decline to say that the local legislatures may not impose a tax by a law which declares that the proceeds of the tax shall be applied to defray the expenses of maintaining the courts of justice; but they say the proceeds cannot be "made part of the general consolidated revenue of the Province;" "for they add, "If it should greatly exceed "the cost of the administration of justice, "still it is to be raised and applied to general "provincial purposes, and it is not more "specially applicable for the administration "of justice than any other part of the general "provincial revenue."

Is this answer, limited as it is, maintainable? In other words, if we assume for the sake of argument, as their Lordships have done, that the local Legislature can tax indirectly to raise means for the maintenance of the courts of justice, can it be seriously maintained that they cannot legislate for this purpose, without declaring into what account the proceeds are to go? There is not a syllable in the whole act to support this pretension. If it be sustainable, it must be as matter of doctrine; and if true as such, no tax could be levied by a local Legislature

without declaring that it was imposed "in order to the raising of a revenue for provincial purposes."

It is a mere waste of time to interrogate sub-section 14 to find in it any special authority to tax. It establishes a local right and its corresponding duty. The local authorities have to provide for every institution, which falls within their jurisdiction, precisely in the same way, whether the statute uses the word *maintenance* or not. The *raison d'être* of this ingenious mode of extending the local taxing power by affecting the proceeds to a particular account does not exist. Furthermore it is prohibited by section 126.

The argument under sub-section 16 has been entirely overlooked. It may just be as well also to notice here, that no attempt has been made to answer the argument that the so-called tax is not properly a tax, but a charge for a service, which the Government is only obliged to perform under the conditions it chooses to impose. There can be no doubt the Provincial Legislature could order its officer not to receive exhibits; if so, it can scarcely be denied that the Legislature might by an Act prohibit the reception of an exhibit unless it had a piece of coloured paper pasted on the corner. And that is what it did, the price of the piece of coloured paper being merely an incident.

All this is so transparently clear that one scarcely wonders that their Lordships should have declined to pledge themselves to the very extreme pretension that the local Legislatures can only raise money by direct taxation, and by licenses of a limited character.

Their Lordships say: "With regard to the third argument, which was founded upon the 65th section of the Act, *it was one not easy to follow*, but their Lordships are clearly of opinion that it cannot prevail." When an argument *cannot prevail*, it is a consolation—a minor one perhaps, but still appreciable—to know that one's argument is not easy to follow. One may have been misunderstood, and that is not necessarily the fault of the disputant. Besides, hazy expression is not always a sign of an illogical mind. It must, however, be admitted that the argument drawn from the 65th section is not easily

seized. It must, notwithstanding, have something to recommend it, for it was suggested by one of the judges in the Queen's Bench, and it was adopted, with alacrity, by the two dissenting judges in the Supreme Court. The argument appears to be this: Section 65, in itself not a very intelligible enactment, in effect, reserves to the Lieutenant Governors of the provinces of Ontario or Quebec, all the powers, which under the pre-existing laws belonged to the Governor General, "as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively."

Section 32, cap. 169, C. S. L. C., provides that the Governor may, from time to time, impose such duties as he thinks fit on any proceedings in any court in Lower Canada, which duties shall be paid over to the sheriff to form part of the Building and Jury fund.

The building and jury fund is an asset of Ontario and Quebec, conjointly, and, by partition, it falls to the share of Quebec. Sects. 113, 142.

By section 126, all portions of pre-existing duties and revenues which are reserved to any province, and all duties and revenues raised by a province, in accordance with the special powers conferred upon it, form its consolidated revenue fund, to be appropriated for the public service of the province.

Therefore, it is contended, the Lieutenant Governor had the right, by Order-in-Council, to impose the tax of 10 cents for the filing of each exhibit, and that by law, as it now stands, it necessarily fell into the consolidated revenue fund of the province. What the Lieutenant Governor could do alone, the whole legislature, of which he is a part, can surely do. It is the Imperial Parliament that ordered that such revenues should go into the consolidated revenue fund, and not into the building and jury fund.

To this the Privy Council answers: "What has been done here is quite a different thing. It is not by the authority of the Lieutenant Governor in Council. It is not in aid of the Building and Jury Fund. It is a Legislative Act, without any reference whatever to those powers, if they still exist, quite collateral to them; and, if they still exist, and if it exists itself, capable of being exercised concurrently

with them, to tax, for the general purposes of the province, and in aid of the general revenue, these legal proceedings."

R.

COURT OF REVIEW.

MONTREAL, Oct. 31, 1884.

Before TORRANCE, PAPINEAU & GILL, JJ.

WHITEHEAD v. KIEFFER, and WHITE, intervenant.

Revision—Final Judgment—Judgment on petition under C. C. P. 869.

Held, that a judgment rendered in an action of revendication, granting a petition of plaintiff, under C. C. P. 869, to have delivery of the goods on giving security, is not a final judgment subject to be reviewed.

Inscription struck.

L. N. Benjamin for plaintiff.

Laflamme, Huntington, Laflamme & Richard for defendant.

COURT OF REVIEW.

MONTREAL, Oct. 31, 1884.

Before TORRANCE, DOHERTY, PAPINEAU, JJ.

WM. ALMOUR v. LA BANQUE JACQUES CARTIER, and A. B. ALMOUR, intervenant.

Cheque—Endorsement—Liability of Bank.

Held, where a cheque was payable to the order of "Wm. Almour," that the Bank on which it was drawn was not justified in paying the amount on the endorsement "Wm. Almour by A. B. Almour," unless the authority of A. B. Almour to endorse for Wm. Almour was proved.

Pagnuelo & Co. for intervener.

Monk & Raynes for plaintiff.

COURT OF REVIEW.

MONTREAL, June 28, 1883.

Before TORRANCE, RAINVILLE, JETTÉ, JJ.

QUINTAL v. AUBIN.

Compensation—C. C. 1188.

Held, that the defendant was entitled to plead, to an action on a promissory note, that the plaintiff was under an obligation to deliver to him a note for a larger amount in

payment of goods sold and delivered, but had made default; and to ask that the note sued on be declared compensated by so much of what was due by the plaintiff.

Béque, McGoun & Emard for plaintiff.

Laflamme, Huntington, Laflamme & Richard for defendant.

COUR SUPÉRIEURE.

MONTREAL, 8 juillet 1884.

Coram MATHIEU, J.

MIRBAULT v. BRUNET et PICOtte.

Certiorari—L'Acte relatif aux Vagabonds—32 et 33 Vict., ch. 28, (1869)—Jurisdiction des Juges de Paix.

JUGES:—Que les juges de paix n'ont pas juridiction pour entendre une plainte ou dénonciation accusant quelqu'un de s'être servi d'un langage insultant dans un bureau privé, quand même la plainte serait amenée, avant la conviction, de façon à y ajouter que le langage insultant aurait aussi été proféré sur la rue publique.

C. Lebeuf, pour le requérant.

F. L. Sarrazin, pour le poursuivant.

Mercier, Beausoleil & Martineau, pour les juges de paix.

COUR SUPÉRIEURE.

MONTREAL, 8 juillet 1884.

Coram MATHIEU, J.

FILIATRAULT v. ELIE.

Action pénale—Sect. 92 de l'acte des élections fédérales de 1874—Affidavit.

JUGES:—Que toute action qui *tam* intentée sous la section 92 de l'acte des élections fédérales, 1874, doit être accompagnée de l'affidavit mentionné à la section 1ère du chapitre 43, du statut du Canada 27-28 Vict. (1864); et qu'une action pendante où cet affidavit n'aurait pas été produit, ne peut être opposée comme fin de non recevoir à une action intentée par une autre partie pour la même offense.

Quimet, Cornellier & Lajoie, pour le demandeur.

Geoffrion, Rinfret & Dorion, pour le défendeur.

COUR SUPÉRIEURE.

MONTREAL, 29 déc. 1884.

Coram MOUSSEAU, J.

VALIQUETTE v. VALIQUETTE et al.

Pension alimentaire—Solidarité de l'obligation de la fournir—Défense en droit.

JUGÉ:—Que l'obligation de fournir une pension alimentaire est indivisible, et que ceux qui y sont tenus, la doivent conjointement et solidairement; que, par suite, l'un d'eux poursuivi seul, a droit d'action contre les autres pour leur faire payer leur quote-part. Que cette solidarité ne cesse que lorsque ceux qui sont obligés de payer n'en ont pas les moyens, ce qui est une question de fait et ne peut être invoquée par défense en droit.

E. Laroche, pour le demandeur.

Duhamel, Rainville & Marceau, pour le défendeur.

COUR DE CIRCUIT.

DISTRICT DE MONTMAGNY,
9 février 1885.

Coram ANGERS, J.

MERCIER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Procédure—Dépôt—Exception préliminaire.

JUGÉ:—Que le dépôt à être fait avec une exception préliminaire doit être en même temps qu'est produite au greffe la dite exception.

Dans cette cause la défenderesse rencontra l'action du demandeur par une exception déclinatoire alléguant que l'action aurait dû être intentée dans le district de Montréal.

Cette exception fut produite au greffe le 16 décembre 1884, sans être accompagnée du dépôt requis par la loi.

Le demandeur fit, le 17, motion pour la faire rejeter faute de dépôt. Alors, le 19, la défenderesse, se trouvant encore dans les quatre jours du "rapport du bref", fit le dépôt nécessaire.

ANGERS, J., rejeta la dite exception et accorda la motion du demandeur par le jugement suivant:

"Où les parties sur la motion du demandeur pour rejeter l'exception déclinatoire de

la défenderesse; ayant examiné le dossier et mûrement délibéré;

"Attendu que la défenderesse n'a pas fait au greffe de cette Cour avec sa dite exception le dépôt voulu dans le délai prescrit, la Cour accorde la dite motion et rejette la dite exception déclinatoire avec dépens."

P. Aug. Choquette, procureur du demandeur.
Abbott, Tait & Abbotts, procureurs de la défenderesse.

C. Pacaud, conseil.
(P.A.G.)

RECENT DECISIONS AT QUEBEC.

Taxes—Municipalités.—Jugé, 1. Qu'après le démembrement d'une municipalité et sa division en deux municipalités distinctes, tout le territoire formant ci-devant partie de l'ancienne municipalité, demeure affecté au paiement des anciennes dettes, et que le conseil de l'ancienne municipalité et ses officiers peuvent percevoir sur tout le territoire, des taxes imposées pour cet objet, et y imposer pour le même objet de nouvelles taxes basées sur la valeur des biens imposables d'après le rôle d'évaluation en force, dans la municipalité originaire, lors du changement de limites, comme si ce changement n'avait pas eu lieu.

2. Que la corporation de l'ancienne municipalité a un droit d'action pour recouvrer ces taxes contre les propriétaires de ces biens imposables, mais que la corporation de la municipalité nouvelle ne peut être directement tenue au paiement de ces taxes, que dans le cas d'un acte d'accord entre les deux corporations, conformément à l'article 84 du Code Municipal.—*La Corporation de Notre Dame du Sacré-Cœur & La Corporation de St. Germain de Rimouski* (Q. B.), 10 Q. L. R. 316; 7 L. N., 407.

Exécuteur testamentaire—Compte.—Jugé, 1. Que, quoique l'exécuteur testamentaire ne doive un compte aux héritiers ou légataires que lorsque ses fonctions ont cessé, cependant, lorsqu'il est mis en possession de tous les biens du testateur et que ses pouvoirs sont continués pendant un long espace de temps, il doit leur fournir à leur demande et à leurs frais, des états de compte et leur permettre l'examen des pièces justificatives; mais que, s'il est poursuivi, sans demande préalable à cet effet, il ne doit pas de frais.

2. Que l'exécuteur testamentaire qui a été nommé en remplacement d'un autre ne doit pas un compte de l'administration de son prédécesseur, et que ce compte ne peut être exigé que de celui qu'il a remplacé, ou de ses héritiers ou successeurs.—*Quinn v. Fraser* (en Révision, Stuart, Casault, Routhier, JJ.), 10 Q. L. R. 320.

JURISPRUDENCE FRANÇAISE.

Chemins de fer—Responsabilité—Avarie—Vice propre—Garantie.

Une compagnie de chemins de fer, à qui l'on présente une marchandise mouillée, est en droit d'exiger que l'expéditeur reconnaisse, dans le bulletin d'expédition, que la marchandise est mouillée, sans que la dite compagnie puisse être elle-même, en ce cas, tenue, à la demande de l'expéditeur, d'indiquer que cet état d'humidité provient du vice propre de la chose.

Elle ne doit pas se faire juge de la cause de l'avarie, ce qui serait intervenir entre l'expéditeur et le destinataire, et créer, sans qualité, un titre à l'un ou à l'autre.

(*Douai, Cour d'Appel, 20 déc. 1884. Gaz. Pal. 7 janv. 1885.*)

Assurances terrestres—Défaut de paiement de la prime—Sinistre—Indemnité—Déchéance—Droit d'option de l'assureur pour résiliation ou exécution du contrat—Demande en paiement de la prime.

1. Lorsqu'aux termes d'un contrat d'assurance contre l'incendie, il est stipulé, "qu'en cas de non paiement de la prime dans un certain délai, la déchéance du bénéfice de l'assurance sera encourue par l'assuré, sans qu'il puisse se prévaloir de l'usage, où est la compagnie de faire réclamer officieusement la prime par ses agents, ni du défaut de mise en demeure pour le paiement de la prime," la déchéance du droit à une indemnité, pour non paiement de la prime, en l'absence de mise en demeure, est régulièrement prononcée contre un assuré, par un arrêt, qui constate en fait et par interprétation de la volonté des parties, qu'il n'y a eu aucune dérogation à la clause précitée.

2. Au cas, où il a été stipulé en outre qu'en cas de retard dans le paiement de la prime, et de déchéance ainsi encourue par l'assuré,

la compagnie d'assurance conservera néanmoins le droit d'option entre la résiliation ou l'exécution du contrat, la demande en paiement de la prime n'emporte pas nécessairement de la part de ladite compagnie, option pour la continuation de l'assurance. (*Solution implicite.*)

En tous cas, il ne peut y avoir de ce chef ouverture à cassation contre l'arrêt qui prononce la déchéance du bénéfice du contrat contre l'assuré, nonobstant la demande en paiement de la prime, formulée par la compagnie, quand ce moyen n'a point été soumis aux juges du fond.

(*Cass. 16 déc. 1884. Gaz. Pal. 16 janv. 1885.*)

Exception de jeu—Marchés à termes sur marchandises—Opérations non sérieuses—Paiement de différences—Commissionnaire—Connaissance personnelle du caractère des opérations—Transaction.

1. Sont nuls, comme constituant des opérations de jeu, les achats et ventes à terme de marchandises, qui, dans la commune intention des parties, ne devaient se réaliser ni par des livraisons, ni des paiements effectifs, mais par le règlement de simples différences.

Et l'exception de jeu est opposable à l'action du commissionnaire, par l'intermédiaire duquel ces achats et ventes ont lieu, en paiement de ces différences, lorsqu'il est constant qu'il avait connaissance du caractère fictif de ces opérations.

Les constatations des juges du fond relativement au caractère non sérieux des opérations, et à la connaissance que le commissionnaire en aurait eue, sont souveraines et échappent à la censure de la Cour de cassation.

2. Une transaction, intervenue sur procès, peut-elle couvrir la nullité, dont une dette de jeu est entachée dans son origine? (*Non résolu.*)

(*Cass. 29 déc. 1884. Gaz. Pal. 16 janv. 1885.*)

Mitoyenneté—Mur—Exhaussement—Travaux exécutés par un seul des co-propriétaires—Épaisseur de la partie exhaussée.

Le co-propriétaire d'un mur mitoyen, qui use du droit d'exhausser le dit mur, n'est point tenu de donner à la partie surélevée une épaisseur égale à celle du mur mitoyen. Il est seulement tenu de supporter seul la dépense

de construction et d'entretien de l'exhaussement, et de payer l'indemnité de surcharge.

L'autre co-propriétaire qui n'a pas voulu contribuer à cet exhaussement, conserve d'ailleurs, en ce cas, le droit de reconstruire la partie surélevée en lui donnant l'épaisseur du mur de dessous, à charge de supporter les frais de démolition et de reconstruction.

(*Toulouse, Trib. Civ. 21 août 1884. Gaz. Pal. 17 janv. 1885.*)

Compétence—Instance pendante—Changement de domicile du défendeur—Assignation en reprise d'instance—Objet différent de celui de la demande originaire—Moyen mélangé de fait et de droit—Cassation—Irrecevabilité.

Le simple changement de domicile d'un ou plusieurs des défendeurs, en cours de procédure, ne peut modifier la compétence du tribunal régulièrement saisi.

L'assignation en reprise d'instance est donc valablement donnée, nonobstant le changement de domicile du défendeur depuis l'assignation originaire, devant le tribunal complètement saisi primitivement par la dite assignation.

Et le défendeur, pour échapper à la compétence de ce tribunal, ne peut exciper, pour la première fois, devant la Cour de cassation, de ce que la demande formulée dans l'assignation en reprise d'instance différerait de celle formulée dans l'assignation originaire. Un tel moyen mélangé de fait et de droit est nouveau, et à ce titre irrecevable.

(*Cass. 30 déc. 1884. Gaz. Pal. 19 janv. 1885.*)

Accident—Demande en dommages-intérêts—Assurance—Fin de non-recevoir—Responsabilité—Cheval emporté—Force majeure—Pris de glace—Devantures de magasins—Glace de luze—Responsabilité partagée.

1. La victime d'un accident est recevable à agir, en son nom personnel, en dommages-intérêts contre l'auteur de cet accident, sans que celui-ci puisse lui opposer comme fin de non recevoir, qu'elle est garantie du dommage par un contrat d'assurance.

2. Le maître, dont le cheval, effrayé par un événement fortuit, a causé un accident, notamment brisé la glace d'une devanture de magasin, ne saurait se soustraire à la responsabilité de cet accident, en invoquant la force majeure, alors qu'il avait commis lui-

même l'imprudence de laisser son cheval, attelé sur sa voiture, stationner libre et sans gardien sur la voie publique, et n'avait ainsi pris aucune précaution en vue de prévenir un accident possible.

3. Celui qui, par son imprudence, a occasionné le bris de la devanture en glace d'un magasin, ne peut être condamné à en payer la valeur réelle. Sa responsabilité est atténuée par celle qu'a assumée, de plein droit, en pareil cas, le propriétaire du magasin, en y faisant placer une devanture luxueuse. Le chiffre de la réparation due, doit en conséquence être modéré.

(*Limoges, Trib. Civ. 26 déc. 1884. Gaz. Pal. 18-19 janv. 1885.*)

Rapport à succession—Legs d'usufruit—Renonciation—Donation indirecte—Rapport—Objet du rapport—Epoque de sa détermination—Evaluation.

1. Le bénéfice d'une renonciation à un legs d'usufruit, dont profite le nu-propriétaire, successible du légataire renonçant, constitue un avantage indirect rapportable à la succession de ce légataire.

Bien que portant sur des fruits, cet avantage n'est pas dispensé du rapport lorsqu'il n'a pas le caractère alimentaire.

2. Le rapport a pour objet : non pas l'usufruit lui-même qui n'a jamais eu d'existence, mais les profits qu'en aurait retirés le légataire, s'il n'y eut pas renoncé, et qu'a recueillis le successible par suite de cette renonciation jusqu'au décès du renonçant, époque à laquelle il faut se placer pour déterminer la quotité du rapport.

3. Pour apprécier l'avantage recueilli par le successible, et à raison duquel il doit le rapport, il faut déduire du revenu touché par le successible toutes les charges dont était grevé l'usufruit et l'excédant de dépenses qu'aurait amené dans la maison du renonçant, l'augmentation de fortune produit par cet usufruit.

(*Limoges, Cour d'Appel, 19 fév. 1884. Gaz. Pal. 20 janv. 1885.*)

THE TESTIMONY OF EXPERTS.

The decision of a very curious question of expert evidence is reported in *People v. Muller*, 96 N. Y. 408. It was there held that

on the trial of an indictment for selling obscene photographs, opinions of artistic experts on the question of obscenity are incompetent. The photographs were from pictures exhibited in the Salon in Paris and at the Centennial Exhibition in Philadelphia; among others, "L'Asphyxie," "After the Bath," and "La Baigneuse." Andrews, J., observed: "It does not require an expert in art or literature to determine whether a picture is obscene or whether printed words are offensive to decency and good morals. These are matters which fall within the range of ordinary intelligence, and a jury does not require to be informed by an expert before pronouncing upon them. It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture, as all know, represent nude human forms. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene, simply on account of their nudity. If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behaviour and bearing may suggest to a prurient imagination images of lust and arouse impure desires, and so may a picture or statue not in fact indecent or obscene. . . . It is not impossible certainly that the public exhibition of indecent pictures may have been permitted in Paris or Philadelphia, and the fact that a picture had been publicly exhibited would not necessarily determine its character as decent or indecent. Indeed there is but little scope for proof bearing upon the issue of decency or obscenity, beyond the evidence furnished by the picture itself. The question which was excluded, if intended to bring out the fact that pictures might be either decent or indecent, and that the canons of pure art would accept those of one class and reject those of the other, was properly rejected as an attempt to prove a self-evident proposition. If the question was intended to be followed by proof, that according to the standard of judgment adopted and

recognised by artists, the photographs in question were not obscene or indecent, it was properly rejected for the reason that the issue was not whether in the opinion of witnesses, or of a class of people, the photographs were indecent or obscene, but whether they were so in fact, and upon this issue witnesses could neither be permitted to give their own opinions, nor to state the aggregate opinion of a particular class or part of the community. To permit such evidence would put the witness in the place of the jury, and the latter would have no function to discharge."—*Albany Law Journal*.

L'AFFAIRE TROUILLEBERT-TEDESCO.

Nos lecteurs se rappellent sans doute l'origine de cette affaire. M. Alexandre Dumas avait dans sa galerie un tableau de Corot, ou qui, du moins, passait pour tel: *La Fontaine des Gabourêts*. Un jour qu'il essayait de faire partager par un de ses amis l'admiration très sincère qu'il ressentait pour l'œuvre, celui-ci déclara que le Corot était un Trouillebert, au bas duquel on avait substitué le premier de ces noms au second. M. Alexandre Dumas s'empessa de renvoyer la toile à MM. Tedesco frères, ajoutant qu'il avait entendu acheter un Corot, non un Trouillebert, et les vendeurs reprirent le tableau. Mais l'incident avait fait du bruit dans le monde artistique. M. Trouillebert s'en émut le premier et assigna MM. Tedesco devant le tribunal civil pour obtenir de la justice le droit d'effacer la signature apocryphe de Corot, et de mettre de nouveau la sienne sur une œuvre qu'il avait déjà primitivement signée. Il offrait au tribunal de prouver par témoins que son nom avait figuré à l'origine sur le tableau, et qu'on l'avait depuis remplacé, dans un but commercial et frauduleux, par celui de Corot. Le tribunal ayant ordonné cette enquête, MM. Tedesco ont interjeté appel de ce jugement avant faire droit. Mais devant la Cour les parties sont tombées d'accord, et ont demandé aux juges d'appel d'infirmar le jugement d'enquête et de reconnaître à M. Trouillebert le droit de signer de nouveau le tableau dont il est l'auteur. La Cour a donc rendu un arrêt conforme à ces conclusions transactionnelles, et condamné MM. Tedesco en tous les dépens du procès.—*Gaz. Pal.* 15 janv. 1885.

The Legal News.

VOL. VIII. FEBRUARY 28, 1885. No. 9.

In the division which took place in the House of Commons on the 19th instant on Mr. Landry's Supreme Court bill, he obtained 34 votes in favor of the second reading, while 125 were recorded against the measure. Only four members representing constituencies outside of Quebec voted with Mr. Landry, showing that the dissatisfaction with the present constitution of the Court is practically restricted to this Province, and proceeds from the fact that our jurisprudence differs from that of the other Provinces, and that only two members of the Court are chosen from the bar of this Province. Hence it happens that a decision of our Court of Appeal, confirming the decision of the Court below, may be reversed by a tribunal chiefly constituted of jurists trained in a different system. The Premier admits the inconvenience, but does not see how it is to be obviated. "The difficulty," he remarked, "arises from the fact that we have not been able to discover a system by which the Supreme Court bench can be strengthened from the Province of Quebec without giving a predominance to that Province on all the cases that come before the Court. If by adding additional judges from the Province of Quebec we would give additional weight to their decisions on cases arising from the Province of Quebec alone, there would be little difficulty—it would be simply a matter of expense. But the House must remember that the judges coming from the Province of Quebec, trained to a different law from the law of England, trained to a different law from the common law that prevails in all the other Provinces, and having an equal voice upon the law with which they are not familiar, can and do frequently take the responsibility of giving judgment against the majority of judges from other Provinces. Now if the bench from the Province of Quebec were strengthened still further, that objection would have still greater force. The other Provinces would say: We are over-ridden;

our judges, trained to the common law of England, are over-ruled by judges coming from the Province where a different system prevails; and so the complaint which now arises, perhaps very naturally, from the Province of Quebec, would simply be transferred to the other Provinces. They would say that the civilians, those acquainted only with the civil law of Lower Canada, were over-riding the common law, which obtained in all the other Provinces." Our own impression is that the apparent difficulty ought speedily to disappear, if due care be exercised in the appointments to the Supreme Court. The difference of jurisprudence ought to be quickly overcome by a competent lawyer; and, at all events, precisely the same difficulty has long existed with reference to the Judicial Committee of the Privy Council. Yet the judgments of that Committee have, upon the whole, been fairly satisfactory, and even now appeals are very often taken to the Judicial Committee, on which our bar is not represented at all, instead of to the Supreme Court, in which we have two representatives.

Our western contemporary, the *Manitoba Law Journal*, seems to think that we are almost as bad as Mr. Travis, by reason of an article which appeared in our columns, criticizing the Boundary decision. We shall not stop to inquire whether there is any resemblance between Mr. Travis' effusions and the article referred to. We merely point out to our contemporary a fact which he has overlooked, but which is perfectly known to our readers in general, and is a sufficient answer to the charge of editorial inconsistency, viz., that the article to which he refers is a signed article, the authorship of which is perfectly known to our readers. Our own feeble jottings do not bear any signature, and just as we do not wish well-known contributors to be held in any way responsible for them, so we do not consider ourselves responsible for the opinions which may be expressed in communicated articles over a signature indicating the author. In accordance with what we believe to be an established rule of journalism, we accord to contributors the utmost freedom in dealing with subjects on

which they may have the best information possible, but as to which we may have formed no opinion whatever.

In a recent Philadelphia case (*Commonwealth v. Keeper of the County Prison*) it was ruled that self-styled spiritual mediums charging admission fees to exhibitions, in which they profess to call up the spirits of deceased persons, are guilty of obtaining money by false pretences. The Court said: "It has been held in England, under a statute similar to our own, that a defendant falsely pretending that he had power to communicate with the spirits of deceased persons, and that he could cause such spirits to be present in a material form, and play upon musical instruments, made a pretension of existing facts; and that obtaining money on such pretences, came within the statute against false pretences. *R. v. Lawrence*, 36 L. T., N. S., 404; *R. v. Giles*, 11 L. T., N. S., 643. Although the fraudulent misrepresentation of an existing fact was accompanied by an executory promise to do something at a future period, it was none the less a false pretence. *R. v. West*, 8 Cox, C. C. 12; *R. v. Jennison*, 9 Cox, C. C. 158. The lady who testified in this case, paid her money on the faith of the representations of the relations, which proved to be false; and thus we have a clear case of obtaining money by false pretences."

The *Montreal Law Reports* for March comprise pages 97 to 144 of the Superior Court Series. Sixteen cases are reported. In the Queen's Bench Series a double number, comprising pages 113 to 224, has been issued, to avoid breaking the report of the judgment in the Provincial Tax cases. This decision may be regarded as the most important that our Provincial Court of Appeal has been called upon to pronounce, both as regards the pecuniary interests involved and the magnitude of the questions submitted. The report, naturally, is rather voluminous. The Court being almost equally divided, and the case being predestined for decision by the highest Court of the Empire, the opinions of the learned judges, unavoidably perhaps, assume to some extent the character of

arguments on one side or the other. We have read these opinions with the greatest attention and we feel that the Privy Council cannot fail at least to obtain from their perusal a fair statement of the difficulties on which they are called to pronounce an authoritative opinion. A good deal of powder has been burned over the question of direct and indirect taxation. A more important question is the interpretation of subsec. 16 of sec. 92 of the Constitutional Act. We are not quite prepared to accept at present the construction put upon this clause by the majority of the Court, but we have the satisfaction of feeling that the question has been so ably and thoroughly discussed that their lordships of the Judicial Committee cannot escape from grappling fairly with the difficulty, and that the decision to be pronounced in England must terminate for ever a great deal of the uncertainty which has beset the taxing powers of the provinces.

The case of *Ross & Langlois*, decided last month by the Court of Appeal, (which will be fully reported in the *Montreal Law Reports*) very closely resembles a decision rendered about the same time by the Supreme Judicial Court of Massachusetts in *Spier v. South Boston Iron Co.* The fact that the Courts reached the same conclusion in each case corroborates the statement that the English and American law differs little from the French law on the question of responsibility of employers for injuries sustained by employees from defective appliances. The Boston case, as reported in the *Law Record*, was an action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant, by the falling of a heavy weight upon his head, occasioned by the rupture of an "S" hook, upon which the weight was hung. At the close of the evidence at the trial in the Superior Court, the defendant asked the Court to rule that, upon the evidence in the case, the plaintiff was not entitled to recover. The Court refused so to rule, and the defendant excepted. The case was submitted to the jury, who found for the plaintiff. Devens, J., said: "There was evidence that would authorize a finding by the jury that the plaintiff was

performing his duty to aid in raising the oven door in the usual and customary way, and in the manner which would enable him to do it most efficiently. Even if he could have stood a little out from under the weights, by the fall of one of which he was injured, he could not then have pulled so well; and he had a right to believe that they were so secured that no danger was incurred by him therefrom. Nor is the fact that the laborers, of whom the plaintiff was one, endeavored to raise the door without waiting for the fireman, who had gone for a bar to pry it up, to be treated as showing a want of due care on his part. There remains the question whether there was any evidence of negligence on the part of the defendant. That the "S" hook, by the rupture of which the injury occurred, was defective, was clearly proved. The master does not warrant to the workman the safety of the appliances; but he is obliged to use all reasonable care consistent with the nature and extent of his business, that such appliances are proper and suitable. He is not responsible for hidden defects that could not have been discovered on the most careful inspection. *Ladd v. New Bedford R. R.*, 119 Mass. 412; *Holden v. Fitchburg R. R.*, 129 Mass. 268-277. The testimony of Morrison was: 'That the hook now looked as if there was a break previous to the main break;' and of Henry: 'That if a man made a careful examination of the hook, after making it he might possibly, or if a man familiar with hooks examined it, he might perhaps, have discovered the flaw which caused the accident; but that these flaws would not be visible on an ordinary inspection.' The fact that there was actually a visible crack or flaw in the hook above the flaw at the place of rupture, and that, as testified, iron will usually break in the weakest spot, taken together tended to show that a careful inspection would have revealed the weakness of the hook."

The Report of the Commission for the consolidation of the Statutes affecting the Dominion has been completed, and submitted to Parliament for legislative action. The Report fills two thick volumes, comprising 178 chapters and 2,258 pages.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 26, 1884.

Before MONK, RAMSAY, TESSIER, CROSS, JJ.

LA CORPORATION DE LA PAROISSE DE STE. ANNE
DU BOUT DE L'ISLE (def. below), Appel-
lant, and REBURN (plff. below), Respdt.

Servitude—Water Course—Procès-verbal.

Although it is within the attributes of municipalities to make by-laws and *procès-verbaux* for the opening of water-courses, and a person injured thereby may have exercised his right of appeal to the county council, and the *procès-verbal* has been confirmed by the county council, nevertheless such confirmation is not a bar to an action to set aside the *procès-verbal* where it orders something to be done which is in itself contrary to law. And so, where the effect of a water-course established by *procès-verbal* was to aggravate greatly the servitude which the plaintiff's land had to bear owing to its being lower than that of his neighbours, it was held, that he was entitled to bring suit to have the *procès-verbal* set aside, although he had appealed previously to the county council and the *procès-verbal* had been confirmed thereby.

Judgment confirmed, Ramsay, J., diss.

Saint-Pierre & Scallon for appellant.*Laflamme, Huntington, Laflamme & Richard* for respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Dec. 9, 1884.

Before DORION, C.J., MONK, RAMSAY, TESSIER and CROSS, JJ.

BLACK et al. (defts. below), Appellants, and
WALKER (plff. below), Respondent.

Simulated deed—Action of third party.

Real estate estimated to be worth about \$1,200 was sold to a person without means for a consideration stated in the deed to be \$3,650. No money was paid, and the vendors remained in possession. The vendee executed a deed of obligation and hypothec in favor of the vendors for the unpaid instalments. Two of these instalments, amounting to \$2,000, were subsequently transferred by the vendors to W. in payment of goods.

Held, that the sale of the property and the

obligation and hypothec in favor of the vendors being simulated and fraudulent, W. was entitled to have the deed of obligation and hypothec from the vendee to the vendors set aside as regards him (the vendee being a party to the suit), and to ask that the vendors be condemned to pay for the goods as his personal debtors.

Judgment confirmed, Monk & Cross, JJ., diss.

Geoffrion, Rinfret & Dorion for appellants.
L. N. Benjamin for respondent.

SUPERIOR COURT.

MONTREAL, Feb. 2, 1885.

Before JETTÉ, J.

BROWN v. ROSS et al.

Procedure—Inscription.

Held, on motion to reject inscription on the merits of an exception à la forme, inasmuch as the exception had not been inscribed either for *enquête* or *enquête* and merits, that there being no question of fact raised by the exception the inscription for hearing on the merits was regular.

Motion rejected with costs.

Buller & Lighthall, for plaintiff.
Cooke & Brooke, for defendants.

COUR SUPERIEURE.

MONTREAL, 18 avril 1882.

Coram MATHIEU, J.

CROWLEY v. CHRETIEN.

Ordre de la cour—Mépris de cour—Contrainte par corps.

JUGES:—Qu'un défendeur qui a reçu l'ordre de la cour de rendre un compte et qui néglige ou refuse de le faire, n'est pas coupable de mépris de cour, et n'est pas sujet à la contrainte par corps, cet ordre équivalant à une condamnation ordinaire.

Règle annulée.

Barnard, Beauchamp & Creighton pour le demandeur.

Robidoux & Fortin pour le défendeur.

CIRCUIT COURT.

MONTREAL, Feb. 10, 1885.

Before DOHERTY, J.

JACKSON v. CUTHBERT.

Saisie-revendication—Landlord and tenant—Art. 1622, C.C.

The plaintiff issued a writ of attachment in *revendication* to recover certain goods and chattels on the premises and in the possession of the defendant. The defendant pleaded that he had a privilege upon the articles for the rent of a third party to whom the premises were let.

Held, that although a landlord has a privilege upon the goods of third parties found on the premises let, yet he must exercise his right by course of law, and as in this case the landlord had not done so, judgment must go for the plaintiff.

Saisie revendication maintained.

Frederic Hague, for the plaintiff.

Duhamel, Rainville & Marceau, for the deft.

COUR DE CIRCUIT.

MONTREAL, 26 janvier 1885.

Coram CARON, J.

ALEXANDER v. LÉGER, et CHAPMAN, opposants, et le demandeur, contestant.

Opposition afin de distraire—Séparation de biens—Contrat de mariage—Interprétation.

Le défendeur et l'opposante, son épouse, sont séparés de biens par contrat de mariage, et entre autres clauses et conventions matrimoniales, la clause suivante fut insérée au dit contrat: "A l'égard des meubles, vaisselles, bijoux, ou autres objets mobiliers, que la future épouse pourra acquérir pendant le mariage, elle sera tenue d'en prendre quittances ou reçus de ceux de qui elle les achètera, afin d'établir par ces quittances ou reçus que ces meubles, etc., ont été achetés par elle et payés de ses deniers; et faute de telle preuve, lesdits meubles, etc., appartiendront au futur époux."

JUGES:—Que cette clause dudit contrat de mariage ne peut être invoquée par les créanciers du mari, mais doit être interprétée comme

n'ayant effet qu'à l'égard du mari lui-même ou de ses héritiers.

A l'encontre de la saisie pratiquée en cette cause, l'opposante a produit une opposition afin de distraire, par laquelle elle réclame comme lui appartenant à titre de propriétaire, certains meubles et effets saisis en cette cause comme appartenant au défendeur son mari, et elle allègue avoir acheté et payé de ses propres deniers lesdits meubles et effets, mais ne produit aucun reçu constatant le paiement d'iceux.

Le demandeur a contesté cette opposition et allègue, entre autres choses, que ladite opposante n'a produit aucun reçu établissant le paiement par elle fait des effets en question, et il en conclut que lesdits effets appartiennent au défendeur en vertu de la clause spécialement insérée audit contrat de mariage à cet effet.

Quoique l'opposante n'ait produit aucun reçu, cependant elle a prouvé d'une manière non équivoque, que les effets en question lui appartenaient.

PER CURIAM. L'opposante n'a pas produit de reçus pour constater que les effets en question avaient été payés par elle, mais d'un autre côté, elle a prouvé à la satisfaction de la cour son droit à la propriété des effets qu'elle réclame. Quant à la clause du contrat de mariage invoquée par le demandeur, elle ne peut avoir d'effet qu'à l'égard du mari ou de ses héritiers et ne peut être invoquée par les tiers. Si les créanciers du mari pouvaient se prévaloir d'une telle clause, ceux de la femme pourraient certainement en souffrir; car dans le cas où une saisie serait pratiquée contre la femme, elle n'aurait qu'à supprimer ses reçus pour que son mari pût faire opposition et réclamer comme sa propriété des effets qui en réalité appartiendraient à sa femme. Je crois donc qu'en donnant à cette clause du contrat de mariage, l'interprétation que le demandeur y attache, ce serait ouvrir une porte à la fraude et je renvoie par conséquent la contestation du demandeur et j'accorde à l'opposante les conclusions de son opposition.

Opposition maintenue.

Augé et Lafortune, pour l'opposante.

M. J. C. Larivière, pour le contestant.

(J.G.D.)

COUR DE CIRCUIT.

MONTREAL, 18 décembre 1884.

Coram MATHIEU, J.

DIONNE v. BONAMI, et BONAMI, opposant, et le demandeur, contestant.

Bref d'exécution—Opposition.

JUGÉ :—*Que la suspension, pendant plus de deux mois, des procédures sur une saisie-exécution, dans le but de permettre au défendeur de s'acquitter par versements, n'affecte en rien le bref d'exécution et n'a pas l'effet de le rendre caduc.*

Un bref d'exécution fut émis en cette cause, et une saisie pratiquée en vertu de ce bref; mais le défendeur ayant offert de payer sa dette à la semaine, le demandeur suspendit ses procédés sur ce bref, à la condition expresse que si le défendeur manquait à ses nouveaux engagements, des avis de vente lui seraient donnés et que les effets saisis seraient vendus.

Le défendeur ayant discontinué ses paiements, le demandeur donna de nouveaux avis de vente: de là opposition de la part du défendeur.

Par cette opposition, il allègue purement et simplement qu'il s'était écoulé plus de deux mois depuis la date de la saisie et des premiers avis de vente, et que pour cette raison le bref d'exécution était devenu caduc et que les procédés sur la saisie étaient radicalement nuls.

Le demandeur a contesté cette opposition et par sa contestation allègue :

Que les procédures sur le bref d'exécution n'ont été suspendues et interrompues que sur la demande expresse de l'opposant qui avait promis payer sa dette par versements hebdomadaires; promesse qu'il n'a pas tenue; et qu'il ne peut maintenant invoquer son fait et sa faute à l'encontre de la saisie, ni se plaindre en quoi que ce soit des procédés du demandeur.

Qu'au surplus, d'après la pratique de cette cour, aucun délai n'est fixé pour le rapport du bref d'exécution.

La cour a pris la cause en délibéré et en rendant jugement a fait la remarque suivante: "L'opposant a demandé délai au demandeur et a obtenu ce délai; il ne peut

s'en plaindre et son opposition est renvoyée avec dépens."

Opposition renvoyée.

Augé et Lafortune, pour l'opposant.

David et Laurendeau, pour le contestant.
(J.G.D.)

COUR DE CIRCUIT.

MONTREAL, 28 janvier 1885.

Coram GILL, J.

BONNIN v. CÔTÉ, et CÔTÉ, opposant.

Bref d'exécution—Saisie—Opposition—Motion.

JUGÉ :—10. *Que d'après la pratique constamment suivie devant la Cour de Circuit pour le district de Montréal, aucun délai n'est fixé pour le rapport du bref d'exécution.*

20. *Que la suspension temporaire des procédés sur un bref ainsi émis, n'a pas l'effet d'invalidier tels procédés, ni de rendre le bref caduc.*

30. *Que l'opposition par laquelle le défendeur attaque la validité des procédés faits en vertu du bref d'exécution en cette cause, et suspendus comme susdit, est frivole et vexatoire et sera rejetée sur simple motion.*

Au mois d'octobre 1884, le demandeur fit émaner, en cette cause, un bref d'exécution et les meubles et effets mobiliers du défendeur furent saisis en vertu de ce bref.

Le défendeur ayant offert de payer sa dette par versements, le demandeur acquiesça à sa demande et fit suspendre les procédés sur la saisie.

Le défendeur ayant failli à ses engagements, le demandeur donna de nouveaux avis de vente.

Le défendeur mécontent des procédés du demandeur les attaqua par l'opposition suivante, par laquelle il allègue :

Que ses meubles et effets mobiliers furent saisis en vertu du bref d'exécution émané en cette cause le 13 octobre 1884.

Que ce bref est maintenant caduc et nul.

Que nonobstant la nullité de ce bref, le demandeur, par pure malice, a fait annoncer dans les journaux, que les meubles du défendeur devaient être vendus.

Que la vente ainsi annoncée ne peut avoir lieu, attendu que tous les procédés faits comme susdit sont nuls et de nul effet. Et il concluait à ce que la saisie fût déclarée

nulle et à ce que main levée lui en fût accordée avec dépens.

A l'encontre de cette opposition le demandeur s'est contenté de faire une simple motion par laquelle il allègue que l'opposition du défendeur est frivole à sa face même et doit être renvoyée.

Il fondait ses prétentions sur le fait qu'aucun délai n'était fixé pour le rapport du bref et que rien dans la loi ne frappe de nullité les procédés ainsi faits. Il ajouta que même en Cour Supérieure, où les formalités sont beaucoup plus rigoureuses, rien n'empêchait de faire un bref d'exécution rapportable un an et plus après la date de son émanation ; et si même ce premier délai n'était pas suffisant, il pouvait encore être prolongé en changeant tout simplement le jour du rapport du bref.

Le demandeur ne fit aucune espèce de preuve, se contentant d'insister sur la frivolité de l'opposition.

PER CURIAM. Le bref d'exécution dont il s'agit est fait sans qu'aucun jour pour son rapport n'y soit mentionné. C'est la pratique suivie devant cette cour, et à ma connaissance elle a toujours été la même. Le procédé dont se plaint l'opposant n'avait rien de contraire à la loi ni à l'ordre public ; il pouvait d'autant moins se plaindre de ce procédé, que c'est en sa faveur et dans son intérêt qu'il a eu lieu : le demandeur lui a accordé un nouveau délai pour lui faciliter le paiement de sa dette et il me semble pour le moins étrange qu'il s'en plaigne. Mais quand même cette raison ne serait pas la cause pour laquelle les procédés sur la saisie ont été suspendus, je serais encore disposé à repousser l'opposition, parce que rien dans la loi n'empêchait le demandeur de procéder comme il l'a fait.

L'opposant a insisté sur le fait que le demandeur devait au moins répondre à son opposition par une contestation régulière et non par simple motion. Je suis encore contre lui sur ce point et je renvoie l'opposition avec dépens comme frivole à sa face même.*

Opposition renvoyée.

L. L. Maillet, pour l'opposant.

Calixte Lebeuf, pour le demandeur.

(J.G.D.)

* *Contrà Denault et vir v. Pratt et Pratt*, opposant, 7 L. N. 415, Loranger, J.

COUR DE CIRCUIT.

MONTREAL, 17 décembre 1884.

Coram MOUSSEAU, J.

GAGNON et al. v. HALL.

*Affidavit pour saisie-arrêt avant jugement—
Motion.*

JURÉ:— *Que l'affidavit pour saisie-arrêt avant jugement, invoqué par les demandeurs en cette cause, et ci-après reproduit, contenait toutes les allégations essentielles pour sa validité et était, en conséquence, suffisant.*

Voici cet affidavit:—

"James Timothy Jordan, commis-marchand, de la cité de Montréal, étant dûment assermenté, dépose et dit: Que Annie Hall, fille majeure dudit lieu de Montréal, est dûment endettée envers les demandeurs, George Arnoldi Gagnon et Charles G. Gagnon, tous deux commerçants, de ladite cité de Montréal, et y faisant affaires sous les nom et raison de "Gagnon frères," en une somme de \$44.42, courant, étant pour balance sur plus forte somme, pour marchandises et effets de commerce vendus et livrés à Montréal, à la défenderesse, pour son profit et avantage, par dame Jenny O'Hare, marchande publique de la cité de Montréal et y faisant affaires sous le nom de "James T. Jordan & Cie", suivant le compte ci-annexé et aux dates y mentionnées.

"Que le 28 octobre dernier (1884), ladite Jenny O'Hare, étant insolvable, fit cession et abandon de tous ses biens et créances, et notamment de la créance ci-dessus désignée, à MM. Kent et Turcotte, savoir: à Ambroise Léonard Kent et Alphonse Turcotte, tous deux syndics et séquestres, de la cité de Montréal, et ce, par acte fait et passé devant Mtre Guy, notaire, à Montréal, appert par la copie dudit acte produite au soutien des présentes.

"Que le 24 novembre 1884, lesdits Kent et Turcotte, étant aux droits de ladite Jenny O'Hare, en vertu de l'acte ci-dessus, ont transporté aux demandeurs en cette cause, par acte sous seing privé, toutes les créances de ladite société James T. Jordan & Cie, au nombre desquelles se trouve la créance susdite de \$44.42, due par ladite Annie Hall, défenderesse en cette cause.

"Que ladite Annie Hall se cache; est sur le point de quitter subitement la province de

Québec; recèle ses biens, et est sur le point de receler ses biens, avec l'intention de frauder ses créanciers, et notamment lesdits demandeurs George A. Gagnon et Charles G. Gagnon.

"Que le déposant croit vraiment que sans le bénéfice d'un bref de saisie-arrêt avant jugement, lesdits demandeurs souffriront des dommages et perdront leur dite créance. Et le déposant après lecture faite a signé." Assermenté, etc.

La défenderesse prétendant cet affidavit défectueux et insuffisant, demanda, par la motion suivante, le renvoi du bref de saisie-arrêt et l'annulation de la saisie pratiquée en vertu de ce bref:

"Motion de la défenderesse que le bref de saisie-arrêt avant jugement émané en cette cause, et la saisie pratiquée en vertu de ce bref, soient déclarés irréguliers, illégaux, nuls, de nul effet et comme non venus, et ladite saisie annulée à toutes fins que de droit, pour entre autres raisons les suivantes:—

1o Parce que l'affidavit sur lequel a émané ledit bref de saisie-arrêt avant jugement, n'a pas été fait dans la forme exigée par la loi et parce que ledit affidavit ne contient aucune des matières, choses et énonciations nécessaires et voulues par la loi pour autoriser l'émanation d'un bref de saisie-arrêt avant jugement.

2o Parce qu'il n'est aucunement allégué dans ledit affidavit, ainsi que voulu par la loi, que la défenderesse était *personnellement* endettée envers les demandeurs.

3o Parce que par ledit affidavit il n'a pas été et n'est point déclaré que les marchandises et effets de commerce vendus et livrés et dont les demandeurs réclament le prix, aient été vendus et livrés à la défenderesse.

4o Parce que les demandeurs, dans et par ledit affidavit, n'ont point défini et spécifié d'une manière distincte, quand et comment la créance sur laquelle et pour sûreté de laquelle ledit bref a été émis, avait été contractée, était exigible ou pouvait être réclmée de la défenderesse, et ce, de manière à ce que cette honorable cour puisse dire et déclarer si la créance mentionnée dans ledit affidavit, était en réalité due par la défenderesse aux demandeurs.

5o Parce que le jour même de la confection

dudit affidavit et de l'émanation dudit bref de saisie-arrest avant jugement, lesdits demandeurs, ainsi qu'il appert par ledit affidavit, n'avait aucun droit d'action contre la défenderesse, le titre de créance par eux allégué dans ledit affidavit, n'ayant jamais été signifié à la défenderesse avant l'émanation dudit bref de saisie-arrest avant jugement.

6o Parce qu'il n'est aucunement allégué dans ledit affidavit, que le déposant était lors de la confection d'icelui, dit affidavit, *informé d'une manière croyable et avait toute raison de croire et croyait vraiment en sa conscience*, que la défenderesse se cachait, était sur le point de quitter la province de Québec, recélait ses biens et était sur le point de recéler ses biens, avec l'intention de frauder ses créanciers et nommément les demandeurs.

7o Parce qu'il n'est aucunement allégué et demandé dans et par ledit affidavit, que sans le bénéfice d'un mandat de saisie-arrest avant jugement, pour saisir les biens meubles et effets de la défenderesse, les demandeurs perdront leur dette et souffriront du dommage.

8o Parce que ledit affidavit sur lequel a émané ledit bref de saisie-arrest avant jugement, est irrégulier et illégal et ne pouvait autoriser l'émanation dudit bref de saisie-arrest avant jugement. Le tout avec dépens."

Au soutien de leur affidavit, les demandeurs invoquèrent, à l'audience, les décisions rendues dans les causes suivantes :

Beafield et al. v. Wheeler, 5 L. C. J. 44; *Lynch v. Ellice*, 12 L. C. J. 209; *Rhodes v. Robinson*, 23 L. C. J. 166; *Lampson v. Smith*, 7 L. C. R. 425; *Dallimore v. Brooke*, 6 R. L. 657.

La cour prit la cause en délibéré et après mûr examen, déclara l'affidavit des demandeurs à tous égards suffisant et renvoya la motion de la défenderesse avec dépens.

Motion renvoyée.

Arthur Desjardins, pour les demandeurs.
Curran & Grenier, pour la défenderesse.

(J.G.D.)

CONTEMPT OF COURT.

The Court of Appeal of the little island of Grenada has very considerably extended the precedents of proceedings for contempt of Court set of late years in England and Ireland. We believe that there is no precedent in these islands for a libel on a judge personally being treated as a contempt of Court and summarily punished; and the reason for immediate proceedings in the interests of

a pending case does not apply. The proper course in the case in question was for the Attorney-General to file a criminal information for a libel. Even the Star Chamber did not proceed summarily either in *Winnan's Case*, when Lord Chancellor Bacon was traduced, or in *Jeffe's Case*, when Chief Justice Coke was called 'traitor and perjured judge.' When Lord Ellenborough, as Chief Justice, was vilified in a newspaper, the proceedings were by information and not for contempt. Unfortunately the defendant cannot appeal to the Privy Council, as was decided in the case of *M'Dermott v. The Judges of British Guiana*, 38 Law J. Rep. P. C. 1, which was a case very like the present. The conviction stated that the appellant 'had been guilty of a high contempt of Court by having printed and published in the *Colonist* newspaper certain articles reflecting upon one of the judges of the Supreme Court,' and ordered that he should be imprisoned for six months. On appeal to the Privy Council before Lord Chelmsford, Sir James Colville, Sir Edward Williams, and Lord Justice Page Wood, it was held that no appeal lies from an order of a Court of Record inflicting punishment for contempt, if it appear on the face of the order that the party has committed a contempt; that he has been duly summoned; and that the punishment awarded is an appropriate one. There is no reason to doubt that these conditions are fulfilled by the present order, and there is no appeal, even if the judges be wrong, upon the question of the application of Lord Campbell's Act. It is therefore high time that the Lord Chancellor's Contempts Bill should be taken up again, and applied to all Crown colonies, into which category Grenada was at its own request reduced in 1876. *Law Journal* (London).

GENERAL NOTES.

Speaking of the St. Louis Court House the *Central Lao Journal* of that city says: "The open halls in the wings of the St. Louis Court House, where the tramps used to sleep in the winter as well as in the summer, have lately been nicely boarded up by the new superintendent of public buildings, so that the tramps are now limited to summer dreams on the east and west fronts behind the great Corinthian pillars. The hitherto open spaces in the wings are now enclosed halls. But the porous stone floors, having absorbed the filth deposited by generations of tramps, smell like the assembled plagues of Egypt. And when we say a thing smells badly in St. Louis, we necessarily mean a great deal."

The Nebraska Supreme Court has rendered an important decision in the case of a man who was refused the privilege of becoming a subscriber to the Nebraska Telephone Company, although he offered to comply with all the requirements usually demanded of subscribers. He brought a mandamus suit to compel the company to permit him to have the use of a telephone upon the usual conditions. The Supreme Court, in deciding in his favor, held the Telephone Company to be a public servant as a common carrier, and as such it must treat all persons alike; and that, where no good reason can be assigned for refusal to furnish a telephone instrument to a person who offers to comply with the regulations, a writ of mandamus will be issued to compel any Telephone Company to supply such persons with the necessary instruments.

The Legal News.

VOL. VIII. MARCH 7, 1885. No. 10.

The entire draft of the proposed New York Civil Code, as to the enactment of which an animated controversy has long been in progress, is published as a supplement by the *N.Y. Weekly Mail and Express*. The text comprises 2,018 sections, or 597 less than our own Civil Code. The articles are tersely drawn, and some of the titles appear to be somewhat fuller than the corresponding titles of the Quebec Code. This draft was reported to the legislature twenty years ago, the author being Mr. Field. It was twice adopted by both houses of the legislature, but defeated by executive vetoes. In California, however, it was carried, and has been in force during the past eleven years.

The *Law Times* (London) refers to the method of proving the law of a foreign country to a jury as an anomalous and unsatisfactory piece of practice. In a recent case the defence to an action on a promissory note raised a question of Argentine law, and in the usual course, a gentleman, who had practised law in the Argentine Republic, was called to elucidate this obscure subject. The result, our contemporary observes, "was an aggravated case of *obscurem per obscurius*. The gentleman in question, though doubtless an expert lawyer, was but an imperfect master of the English language, and his knowledge of English legal terms and technicalities appeared to be absolutely nil. To make matters worse, he was the only available exponent of the jurisprudence of his native land in London, and plaintiffs and defendant had each competed for such assistance as he could afford their case. It is not too much to say, that by the time this gentleman had been examined and cross-examined for a couple of hours, the jury knew about as much of the laws of the Argentine Republic as of those of Fiji, and but for the parties being able to agree on a translation of portions of the Argentine Code which were put in as supplementary evidence,

the verdict would have been given quite as much upon matter of imagination as upon matter of fact. At the best of times, there is something highly irrational in leaving a body of laymen to decide questions of foreign law often of great technicality and intricacy. It would be more just and more expedient to leave these questions to be determined in the usual way by the judge, upon such properly authenticated evidence of the law in question as is always readily accessible."

The *N. Y. Daily Register* suggests that counsel should be careful in entering upon cross-examination. "A vigorous and prolonged cross-examination," it says, "tends to make the jury think that the witness must have said something very damaging in his direct examination to require all this effort to break him down. If he is recollected to have said anything damaging, its importance is magnified by an apparent fear on the part of cross-examining counsel to let it go unqualified; if it is not recollected, or its damaging significance was not appreciated, the more intelligent of the jury set themselves to studying out what it was or imagining something. In either case, if the cross-examiner unluckily puts the question so common in one form or another on cross-examination which allows the witness to reiterate his former answer and clinch it, perhaps, with an addition, the result is to magnify and double the value of the direct examination at the same time manifesting to the jury the importance which counsel attach to the subject on which they are thus discomfited."

TAMPERING WITH JURORS.

In the course of his charge to the Grand Jury, at the opening of the March Term of the Court of Queen's Bench, Crown Side, Montreal (March 2), Mr. Justice Ramsay made the following observations:—

"There is one danger to which you are exposed, and to which I think it necessary, particularly at the present moment to draw your attention, and that is the manœuvres of interested persons to bias your minds. This applies to the petty jurors, who are supposed to be present and to hear the charge, as well as to you; but you have specially pledged

yourselves, by a solemn oath, to keep secret the Queen's counsel and that of your fellows. This you can scarcely do if you allow yourselves to be drawn into conversation about the matters which are to be laid before you. Sooner or later you will betray your trust, or suffer yourselves to be influenced by impressions and opinions unlawfully communicated. What you have to be mindful of is, to shun all communications with those outside of the jury-room relative to your business within its walls. I do not give you this caution to warn you against a danger to which you may be exposed, but to tell you of one which is only too real. A few months ago, in another town in this Province, one of the persons employed in the service of the Court, profiting by his position, conveyed a jurymen, impaneled to try a capital felony, to an apartment distant from that of his fellows, and entertained him with drink for a considerable period of time. What passed between this unfaithful officer and the juror is only known by their own report, but the result was to disturb materially the course of justice.

In Ontario, the other day, a constable admitted having approached a juror in the interests of the accused. He was instantly, and very properly dismissed from his office. Among the bills to be submitted to you, there will be one or more charging two persons with an offence of a similar kind. It will be your duty to examine these accusations with great care and discernment, for there is nothing more justly alarming to the public mind than to have reason to believe that the administration of justice is subject to any unseen influence. In order that you may be prepared to appreciate the nature of the testimony that may be produced in support of these accusations, it is proper that I should explain to you the law on the subject.

Every attempt to suppress justice and truth, or even to delay justice is reprobated by the common law. At a very early time the more common modes of interfering with the administration of justice were prohibited by statute, and two of them, maintenance and champerty (that is the mischievous maintaining suits and dealing in suits), were specially made punishable as misdemeanours by the II H. 6.

"The particular offence which will be brought under your notice is what is called embracery. It comes under the general head of maintenance and is defined as being "an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainment and the like." IV Blackstone, Comm. 140. On this all the authorities are agreed. It is an indictable offence at common law as all other kinds of maintenance. 2 Hawkins, P.C. 413. The same writer tells us what acts of this kind are altogether unlawful. And he says: 'It seems clear that neither the party himself, nor his counsel, nor attorney, nor any person whatsoever, can justify any indirect practices of influencing a jury, either by giving or promising them money, or men-aging them, or instructing them in the cause beforehand, &c.' Ib. 412. It is proper, however, to observe that it is not every word said to a juror relative to a suit or prosecution, which will come under the definition of embracery. And so it has been said: 'That any person who may justify any other act of maintenance, may safely labour a juror to appear and give a verdict according to his conscience, but that no other person can justify intermeddling so far,' &c. Ib. 412. Without entering into the justifications of maintenance, I may say in general terms that those are justified in maintaining suits who are interested in them.

"The first step in your examination will be to discover whether a *prima facie* case is made out, of solicitations to a juror or to jurors; the second, whether the persons accused of soliciting were interested in the proceeding, and if so, whether the solicitations were innocent in their nature,—that is, that they were no more than an invitation to be present, so that the party might have the advantage of the presence of the juror, to which he is entitled.

"There is another kind of interference which is not within the reach of the law, but which you can easily repress by a little firmness. There are many busy-bodies in the world, who, having no particular business of their own worth attending to, spend their time in meddling with matters that don't concern them, and very often with matters

which they comprehend very imperfectly. One of their fields of operation is making fussy suggestions to different members of the Grand Jury in order to air some hobby of their own. Nothing is more calculated to destroy the moral influence of the Grand Jury than would be the practice of dealing with matters which in no way concern them. Now, gentlemen, it is very specially your duty to bring to the knowledge of the Court any abuse which it is within the power of the Court to correct; but this you should do on mature consideration, and on your own responsibility, and not at the simple suggestion of others. If any one approaches you with a complaint about a matter you cannot enquire of personally, let him make an affidavit of circumstances, and return it forthwith, so that it may be inquired of immediately and justice be done. You are also authorised to visit the common gaol of the district, so that you may be able to assure the Court that it is kept in good order and under proper discipline, and that no one is unjustly detained there. On the other hand, it is not your duty to suggest to the Court what punishments the Court should inflict. These suggestions are generally the result of exaggeration and passion frequently produced by healthy prejudices, but not for that reason less to be avoided in the administration of justice."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, Feb. 6, 1885.

Before DORION, C.J., RAMSAY, TESSIER, CROSS, and BABY, JJ.

DUFOUR, Appellant, & ROY, Respondent.

Landlord and Tenant—C. C. 1054—*Responsibility for acts of tenant.*

- Held:**—1. *That a tenant is not under the control of his landlord within the meaning of 1054 C. C., so as to make the landlord responsible for the negligence of the tenant in the use of the premises leased to him.*
2. *That a proprietor is not responsible for loss occasioned by sparks from the furnace and chimney of a tannery erected and leased by him, where there is no defect in the construction of the furnace, etc.*

This was an action of damages for setting fire to the barn and farm buildings of the appellant owing to the negligence of the defendants. The negligence consisted, it is alleged, in the construction and use of the furnace and chimney of a factory for the manufacture of leather. The declaration is in these words: "*Que la construction de la dite fournaise et du tuyau qui la surmonte était tellement dangereuse surtout avec le combustible employé, que lorsqu'elle était en fonctionnement ils mettaient le feu aux bâtimens environnantes.*" The defendants, respondent and one Turgeon, were sued without any distinction as having constructed and put in operation this machinery. It was also alleged in the declaration that the factory was built nearer the land of the plaintiff than was permitted by the concession to Roy by appellant, it being stipulated in the title of the former that he should put up no building, where he, in fact, built, for fear of fire.

The defendants severed in their defence. Roy pleaded that he was not working the tannery in question at the time, but had leased it to the other defendant Turgeon. By the general issue he denied any responsibility.

Turgeon pleaded that he was tenant; that he had done nothing to augment the risk, and that he had used special diligence and care in the operations.

By the judgment of the Superior Court, the tenant was condemned to pay \$415 damages, and the action against the proprietor was dismissed, on the ground that the fire was not due to any fault of construction but only to the misuse by the tenant. From this judgment, as regards the proprietor, the plaintiff appealed.

The Court was of opinion that there was no evidence to establish that the respondent Roy carried on the works, and that Turgeon was his *preposé*. The relation between them appeared by the lease filed to have been that of landlord and tenant from the 12th Sept., 1881—eight months before the fire. There was also the testimony of Jules Dufour, nephew of appellant, and his witness, who says he was employed by Turgeon. There was no evidence of *vice de construction* to alter the ordinary rule of responsibility,

and it was not established that the factory had been built nearer plaintiff's buildings than the original concession from plaintiff allowed, even if this stipulation was binding on the appellant.

The Court therefore maintained the judgment of the Superior Court on the principle that Turgeon was not under the control of Roy (Art. 1054, C. C.), and that there was no defect in the construction of the factory.

Judgment confirmed.

COURT OF QUEEN'S BENCH.

QUEBEC, Feb. 7, 1885.

Before DORION, C.J., RAMSAY, TESSIER, CROSS, & BABY, JJ.

THE UNION BANK OF LOWER CANADA (plff. below), Appellant, and NUTBROWN (def. below), Respondent.

Hypothecary action—Averments of declaration—Evidence.

HELD: 1. (*Confirming the judgment in Review, 10 Q.L.R. 287*)—That the allegation in a hypothecary action of the granting of a hypothec is in effect an allegation that the person creating the hypothec had power to do so, and therefore under such allegation the Court will admit evidence to prove the existence of such power.

2. That the plaintiff in a hypothecary action must prove that the grantor of the mortgage was proprietor of the immoveable hypothecated at the time the mortgage was granted, and that this cannot be shown by verbal testimony. (*Renaud & Proulx, 2 L. C. Law Journal, 126, approved.*)

3. Where two notaries, as witnesses, sign a conveyance of lands held in free and common socage their signatures must be proved like those of other witnesses. (*C.S.L.C. Cap. 37, Sect. 56.*)

4. A deed of conveyance of land which has not been signed by the purchaser will not make proof that he had power to create a hypothec on the property.

RAMSAY, J. This is an hypothecary action brought by appellant on an obligation of the 21st Dec., 1867, by "The English and Cana-

dian Mining Company" to Dr. Jas. Douglass, for \$40,000, payable in five years, with interest at 8 per cent., and for security of which sum the said Company hypothecated half of lot No. 14 in 14th range of the township of Leeds. The deed was registered on the 31st March, 1868. On the 26th June, 1871, Douglass transferred \$10,000 of this sum to appellant with priority of hypothec, and this transfer was registered on the 17th July, 1871.

The respondent met this action by a demurrer, setting forth that it was not alleged in the declaration that "The English and Canadian Mining Co." was owner in possession of the property of the Company, or that the Company was incorporated, or what powers those creating the mortgage possessed. The defendant besides filed three pleas. By the first he pleaded that the pretended obligation was false and simulated; that the English and Canadian Mining Co., had no legal existence, and that those who signed for the Company were not authorised to sign, and that the whole deed was simulated and unreal. By the second plea the defendant pleaded a possession of thirty years and more by himself and his *ancêtres*. And by his third plea he pleads that he cannot be dispossessed until he has been paid \$800 for improvements.

In the Court of first instance the demurrer was dismissed, and on the merits it was held that the chain of plaintiff's titles went back to the original patent to Sergeant Harris in 1834; that respondent's possession could not go back further than 1853, and that as he was a possessor in bad faith he had no right to his improvements.

Respondent took the case to Review, where it was held that the demurrer was rightly over-ruled, and the declaration was declared to be sufficient. It was also decided that Nutbrown had not established his prescription of thirty years, and that he had no right to improvements, if any he had made, as he was a possessor in bad faith. Furthermore, the Court decided that it was established that his pretended improvements were really none, as the land would have been more valuable as a forest than it is now with the wood cut. But the Court held that it was necessary in an hypothecary action to show

that the party granting the mortgage had a right to mortgage, that this could not be shown by verbal testimony, and that in this case the title was incomplete. In support of this opinion, the Judges in Review suggested two objections, the former of which seems only to have been held by one Judge, the other two expressing no decided opinion upon it; but all three agreeing in the second objection.

The first of these objections was that the execution of the deed under which it was alleged that "The English and Canadian Co." held was not proved; that is, there was no evidence of the signature of the vendors or of the quality of the persons signing for the selling Company. The second objection is that the deed of obligation and hypothec was not signed by the President and Secretary of the English and Canadian Mining Company, and was not sealed by the seal of the Company as it purports to be, and therefore the action was dismissed *sans à se pouvoir*.

The majority of the Court is of opinion that the judgment of the Court of Review should be affirmed. As I am not sure whether we are perfectly agreed as to all the reasons which have led us to this conclusion, I shall endeavour to explain the view I take of the case.

In the first place it is unnecessary to refer to the demurrer, as we have the whole case before us on the merits. I think, however, it is to be regretted that demurrers are received with so little favour in our courts. The question of law can be as well decided on a suppositious case as on the evidence, and at much less cost.

The deed in question (13th Sept., 1858), which is not in notarial form, is attested by two witnesses, who appear to be notaries, as they have appended the letters N.P. to their names. Section 56, cap. 37, C. S. L. C., enacts that a conveyance of lands held in free and common socage may be conveyed by a deed before two witnesses, or before a Notary and two witnesses, or before two Notaries in the form of Schedule D, and this deed may be registered on the affidavit of one of the witnesses. There is nothing in the Statute to declare that the deed, being signed by a Notary and two witnesses, or by two No-

taries, shall prove itself; but it is argued that, in the absence of any such provision, we are to consider the Legislature to have constituted as a notarial deed any contract of conveyance which one or two notaries has witnessed, and this more particularly, as notarial deeds have no particular form. The majority of the Court cannot adopt that view. We are of opinion that the intention of Section 56 was to enable parties to make a conveyance either in the notarial form, which is well known to the law, or before witnesses in the English form, and that if two notaries sign as witnesses their signatures must be proved as if they were witnesses. A notarial deed on its face shows the authority of the notary, and the letters "N.P." are only used to indicate more completely which is the notarial signature. We, therefore, think the judgment should be confirmed on that ground alone.

As to the second objection, it is clear that the deed is not complete. It was to be signed by the purchasers, and so it is declared in the deed, but in fact it never was signed by them. The form D referred to in section 56, cap. 37, C. S. L. C. contemplates the signature by both vendor and purchaser. The statute expressly declares that the intention of the bargainor to sell and of the bargainee to purchase must be manifest by the deed, and there is a place in the form for the two signatures. But the reason to doubt that this is essential arises from this, that the right to convey, by a deed in the English form, land in free and common socage is derived from the 9 Geo. IV., confirmed by the 20 Vic., cap. 45, s. 1, an act subsequent to that last cited, which was of the 4 Vic. It is, therefore, evident that any deed under the English form would be a full conveyance. Now would this deed, in its incomplete form, convey property in England? And can its insufficiency be supplemented by its future acceptance by another deed by which the purchaser refers to the sale, recognizes it, and mortgages the land? I confess that if it had been necessary to decide this point, in adjudicating on this case, I should have required more time than I have had, to enable me to understand sufficiently the intricacy of English conveyancing. I may, however, say that I think the deed is

incomplete, and that it could not be made complete by any act of the purchaser, save its acceptance. There are covenants in the deed which bind the purchaser, and the general principle seems to be that in any agreement the party charged ought to sign. Where one of the parties charged does not sign, perhaps this might be covered by an acceptance, by another deed to which the vendor is a party, but if it is a stipulation of the deed that the purchaser must sign, I don't see how the failure to sign can be got over by some other act of one of the parties. No competent notary would deliver an expedition of an imperfect deed such as this is. It is, however, said, there is the delivery here of the original. Can we presume from that the consent of the vendor?

But I do not think the case need turn on either of these questions. I agree with the two courts in their appreciation of the evidence that at the time of the institution of this action the respondent had not acquired the prescription of 30 years. But he had occupied for nearly 30 years as owner. This would have availed him nothing in face of a good title going back to an actual possession *animo domini*. This, it seems to me, appellant has not got. Bignell's title from Harris is not proved. We have only a copy of the registration—the loss of the original is not proved, and the copy we have got purports to be attested by only one witness. To my mind there is no evidence of possession by any of these pretended proprietors. The only thing they did with regard to the land was to seek for ore there with Nuthrown, and not as owners of the land. They never dispossessed Nuthrown, who remained from that day till he was sued as he had been, the undisputed possessor *animo domini*. On the Harris lot appellants, therefore, claim to have an hypothec from persons who only had fabricated titles, without any dealing with the land as owners save their own assertions. The title is in Harris, but appellants are not Harris.

Two other points have been urged in favor of appellants. First, that the defects of their title are not specially pleaded. Second, that titles are relative, and that appellant's title is better than the respondent's. The answer to the first of these points is, that appellants

filed these titles with their answers, and without special permission, which should only have been granted with leave to plead, and by the judgment their rights are saved. As to the second point, I can hardly understand this doctrine of relative titles. One title defeats another, but hardly because it is *relatively* better. Here, however, the question is between a title from a non-possessor and possession, and the rule is *melius est causa possidentis*.

The judgment of the Court of Review will be confirmed.

TESSIER, J., said that a notary who did not attest a notarial deed was only a witness. A notarial deed set forth the fact that it was made "Pardevant le notaire soussigné," the place where he was acting and for which he was matriculated.

Judgment confirmed.

Laurier & Lavergne for appellants.

E. Crépeau, Q.C., for respondent.

COUR DE CIRCUIT.

MONTMAGNY, 9 février 1885.

Coram ANGERS, J.

PAQUET v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Assignment—Art. 34 C. P. C.—Exception déclinatoire—Jurisdiction.

JUGÉ:—*Qu'une personne engagée à Montmagny, pour aller travailler sur la ligne du chemin de fer que construit la Compagnie du Facif-que dans la province d'Ontario, ne peut poursuivre la défenderesse à Montmagny, endroit où elle a été engagée, pour recouvrer d'elle des dommages occasionnés par le refus de la dite défenderesse de procurer de l'ouvrage au demandeur, quand celui-ci s'est présenté pour obtenir de l'ouvrage à l'endroit où la compagnie construisait la dite ligne de chemin de fer dans la province d'Ontario.*

Le demandeur par son action réclamait des dommages pour la somme de \$46.25, alléguant dans son action que dans le cours du mois d'octobre 1883, il avait été engagé à Montmagny, par un des agents de la défenderesse, pour aller travailler sur la ligne du chemin de fer qu'elle construisait dans la province d'Ontario; qu'il avait quitté Montma-

gny sous la conduite d'un des agents de la défenderesse, qui avait payé son passage et s'était rendu à la tête du lac Supérieure, dans la province d'Ontario, s'était présenté aux agents de la défenderesse, pour obtenir de l'ouvrage, mais qu'on avait refusé de lui en procurer.

La défenderesse a rencontré cette demande par une exception déclinatoire alléguant que la Cour à Montmagny n'avait pas de juridiction pour juger cette cause, parcequ'il apparaissait par la déclaration du demandeur que la cause d'action était originaire non dans le district de Montmagny mais dans la province d'Ontario, et que sous ces circonstances la défenderesse ne pouvait être assignée qu'à son domicile légal en la cité de Montréal. La défenderesse s'appuyait sur l'article 34 C. P. C.

La Cour a maintenu l'exception de la défenderesse et a rendu le jugement suivant :

" La Cour etc. ;—

" Considérant que la demande du demandeur est pour dommages lui résultant du refus de la défenderesse d'employer le demandeur sur ses travaux dans la province d'Ontario aux termes d'un engagement verbal allégué fait à Montmagny ; que le refus de l'employer est la cause de l'action, lequel refus a eu lieu hors du district de Montmagny, et que partant la Cour ici n'a point de juridiction à défaut d'assignation de la défenderesse dans ce district, maintient l'exception déclinatoire de la défenderesse avec dépens."

P. Aug. Choquette, Pro. du demandeur.

Abbott, Tait & Abbotts, Pros. de la défenderesse.

Charles Pacaud, Conseil.

COUR DE CIRCUIT.

MONTMAGNY, 19 février 1885.

Coram ANGERS, J.

MEEURIE V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Les faits sur lesquels est basée cette action sont à peu près les mêmes que dans la cause précédente, mais en outre des dommages que le demandeur réclamait, pour de l'ouvrage que la défenderesse avait refusé ou

négligé de lui procurer, immédiatement après son arrivée à l'endroit de l'exécution des travaux de la défenderesse, il réclamait aussi un certain montant, comme balance qui lui était due sur gages. Dans ce cas comme dans l'autre la Cour a maintenu l'exception déclinatoire de la défenderesse et rendu le jugement suivant :

" La Cour etc. ;

" Considérant que la demande du demandeur est pour dommages et gages ; que les dommages sont pour refus ou négligence de la défenderesse à Ontario d'employer le demandeur sur ses travaux en cette province ; que les gages demandés sont pour travaux faits par le demandeur pour la défenderesse aussi à Ontario, en vertu d'un engagement verbal fait entre les agents de la défenderesse et le demandeur en la ville de Montmagny, que le dit refus ou négligence d'employer le dit demandeur et le dit travail du demandeur sont les causes d'action du demandeur, lesquelles ont originées à Ontario et que partant la Cour à Montmagny, à défaut d'assignation dans les limites de ce district, n'a point juridiction, maintient l'exception déclinatoire de la défenderesse avec dépens."

P. Aug. Choquette, Pro. du demandeur.

Abbott, Tait & Abbotts, Pros. de la défenderesse.

Charles Pacaud, Conseil.

COUR DE CIRCUIT.

MONTREAL, 20 février 1885.

Coram DOHERTY, J.

ROBILLARD V. FINN.

Billet promissoire—Droit d'action—Exception déclinatoire.

Le 16 août 1884, le défendeur Timothy Finn, résidant à St-Eugène, dans le comté de Prescott, Ontario, consentit et signa, en ce lieu, en faveur du demandeur, son billet, par lequel il promit payer, sous trois jours, à l'ordre du demandeur, au bureau de poste de Mongenais, dans le comté de Vaudreuil, district de Montréal, la somme de \$70 pour valeur reçue ; mais le billet ne fut pas honoré à échéance.

Jugé, sur exception déclinatoire : Que le droit d'action en cette cause a pris naissance à Mongenais, district de Montréal, où le

billet était payable et où le défaut de paiement a eu lieu, et non à St-Eugène, dans la province d'Ontario, où réside le défendeur et où le billet en question a été consenti et signé.

Le défendeur, poursuivi à Montréal, pour le montant du billet susmentionné, a produit à l'encontre de cette action, l'exception déclinatoire suivante, par laquelle il allègue :

1o. Qu'il (le défendeur) n'est pas justiciable de cette cour, parce qu'il réside dans la province d'Ontario, hors des limites de la juridiction de cette cour.

2o. Qu'il n'a pas été assigné personnellement dans les limites du district de Montréal, mais à St-Eugène, comté de Prescott, dans la province d'Ontario.

3o. Que le billet sur lequel est fondée l'action en cette cause, a été consenti et signé à St-Eugène, province d'Ontario, hors des limites de la juridiction de cette cour.

4o. Que bien que le lieu où le billet en question devait être payé soit dans le district de Montréal, cette raison n'est pas suffisante pour donner juridiction à cette cour. Et il concluait au renvoi de l'action sauf recours devant le tribunal compétent.

A l'audience, le demandeur combattit vigoureusement cette exception, soutenant que dans le cas actuel, le droit d'action avait pris naissance au lieu même où le défendeur avait manqué de remplir son obligation, c'est-à-dire à Mongenais, dans le district de Montréal; et à l'appui de ses prétentions, il cita les décisions suivantes :—*Thompson v. Dessaint*, 14 L. C. J. 184; *Joseph v. Paquet*, 14 *ibid.* 186; *Welch v. Baker*, 21 *ibid.* 97; *Danjou & Thibodeau*, 1er Déc. C. d'Appel, 98; *Davidson & Laurier*, 1er Déc. C. d'Appel, 366.

Au cours de ses observations dans cette dernière cause, l'honorable juge Ramsay fit les remarques suivantes :—"If we look to the reason of the rule, it seems to me to be entirely in favour of saying that there is jurisdiction at the place where the right of action arises, and not where the cause or the whole cause, or all the circumstances out of which the action originates, arise. In the first place it is more practical. A right of action arises where there is a breach of the contract, where the parties have agreed to act and where the wrong is done. There is nothing equivocal in that, but if we are to go into the whole cause there is no end to metaphysical difficulties..... In the second place, there is no hardship in one being sued for his fault

or his failure, at the place where his wrongdoing or neglect took place."

De son côté, le défendeur a cité : *Wardle v. Lenghan et al.*, 1er R. J. de Q. 61; *Mulholland et al. v. La compagnie de fonderie de A. Chagnon et al.*, 21 L.C.J. 114.

La cour, après mûre délibération, a renvoyé l'exception déclinatoire du défendeur, avec dépens.

Exception déclinatoire renvoyée.*

Archambault, Lynch, Bergeron & Mignault, pour le demandeur.

Macmaster, Hutchinson & Weir, pour le défendeur.

(J. G. D.)

LES CREANCIERS DE SARAH BERNHARDT.

Mme Sarah Bernhardt, ayant des dettes et étant dans l'impossibilité de les payer intégralement, s'est décidée à abandonner à ses créanciers une partie de ses appointements, d'ailleurs frappés d'opposition. Par l'organe de M. Chérançy, son avoué, elle a introduit un référé tendant à ce qu'il lui fût permis de prélever chaque soir sur les 1,500 fr. versés chaque jour pour elle, à la caisse du théâtre de la Porte-Saint-Martin, une certaine somme destinée à faire face à ses mêmes dépenses. M. Baudoin, avoué, se présentait pour M. Ballande, créancier de 12,500 fr.; M. Popelin, pour M. Derembourg, créancier de 81,652 fr.; M. Champetie de Ribes, pour M. Langlois, créancier de 20,000 fr.; M. Engrand, pour M. Laplague, créancier de 22,000 fr. D'autres créanciers, assignés par leur débitrice, ont fait défaut. M. Duquesnel, directeur du théâtre de la Porte-Saint-Martin, s'est présenté en personne. M. le président d'Aubépin, juge des référés, a rendu l'ordonnance suivante :

"Nous président,

"Attendu qu'il y a lieu de limiter l'effet des oppositions formées sur les appointements de Sarah Bernhardt qui lui sont nécessaires, pour partie au moins, pour faire face tout à la fois aux besoins matériels de sa vie et à l'exercice même de sa profession d'artiste;

"Au principal renvoyons les parties à se pourvoir et cependant dès à présent et par provision, vu l'urgence, autorisons Sarah Bernhardt à toucher de Duquesnel & Cie la somme de 600 fr., par chaque représentation donnée par elle, l'effet des oppositions demeurant provisoirement réservé sur le surplus de ses émoluments;

"Nommons Duquesnel, directeur de la Porte-Saint-Martin, séquestre à l'effet de retenir le surplus des appointements pouvant être dus à Sarah Bernhardt et à le répartir à qui de droit, ou de le consigner pour le compte des ayants-droit."—*Gaz. Pal.* 15 janv. 1885.

* Voir aussi *Frueher v. Poinchaud et al.*, 3 L.N. 316.

The Legal News.

VOL. VIII. MARCH 14, 1885. No. 11.

The long vacant Chief Justiceship of the Superior Court has been filled by the appointment of Mr. Justice Stuart, of Quebec, to the position resigned by Chief Justice Meredith. Mr. Justice Stuart is, we believe, next in seniority, to the ex-chief. Mr. F. W. Andrews, of the Quebec bar, has been elevated to the Superior Court bench in the room of Mr. Justice Stuart.

In the year 1884, according to *Whitaker's Almanac*, fifty-eight appeals were entered to the Judicial Committee of the Privy Council. Thirteen were dismissed for non-prosecution. In nineteen the previous judgments were reversed, and in four varied. Of the last hundred and fifteen appeals, thirty-five were from India, seventy-eight from the colonies, and two from the Channel Islands and Isle of Man.

Even-handed justice is administered in the Isle of Man. At a Petty Sessions Court held at Douglas on the 14th February, Deemster Gell, Her Majesty's second judge, the Speaker of the House of Keys, the governor's secretary, the high bailiff of Peel, and four members of the Manx bar, were fined 6d. each, without costs, for being on licensed premises after 11 o'clock at night, on December 19. Deemster Gell, on that evening, entertained the governor and island officials and advocates, at the Castle Mona Hotel, to dinner, to celebrate his elevation to the bench, and the manager, who had neglected to obtain an "extension of time" license, had been fined 6d. a fortnight previously.

The correspondent of the *Daily Chronicle*, writing from Gubat, in the Soudan, notes a proceeding of the Mahdi which will give rise to an interesting question as to the rights of *bond fide* holders. He says: "The Mahdi, when Khartoum fell, secured the whole of General Gordon's papers, together with a

large number of bank notes issued by the gallant defender of Khartoum. These, we are informed, he is now taking steps to negotiate, and obtain much-needed ready cash by discounting them. As Gen. Gordon pledged England's word to redeem them, it will require some ingenuity to defeat the Mahdi's object. Indeed, it will be next to impossible to detect the notes which the Mahdi has seized and those which have been circulated *bond fide* by Gen. Gordon himself, especially as all documents are in the False Prophet's hands."

A propos of the Woman Franchise Bill an opinion may be quoted from the life of "George Eliot," just published. "George Eliot," herself one of the most gifted women of the century, had not a very elevated opinion of the sex, for she says:—"A notable book just come out is Wharton's 'Summary of the Laws relating to women.' 'Enfranchisement of women,' only makes creeping progress; and that is best, for woman does not yet deserve a much better lot than man gives her." But it should be added that things are considerably changed, even during the quarter of a century since the above was written; and the writer herself, in a letter of subsequent date, says, more seriously, "on the whole I am inclined to hope for much good from the serious presentation of women's claims before Parliament."

That benevolence should be its own reward is an axiom inculcated afresh in a recent decision by Mr. Commissioner Kerr. A valuable dog having followed a stranger, he not only gave it board and lodging but advertised for its owner, who was thus enabled to recover it. The owner refused, however, to pay anything for its keep, or even to defray the cost of the advertisement, and was consequently sued. He contended that it was the duty of the plaintiff to take the dog to the nearest police-station. The judge disputed this view, but decided against the plaintiff, who, however kindly he had behaved, could not legally claim compensation for doing voluntarily what he was not obliged to do. On this the defendant actually asked for costs, but was refused them with a judicial expression of

the opinion that the plaintiff had been treated "very scurvily." Probably the dog was tired of so "scurvy" a master and wished to find a worthier patron. The next time the plaintiff meets him straying he will leave him to the tender mercies of the dog-stealers.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, Feb. 7, 1885.

Before DORION, C.J., RAMSAY, TESSIER, CROSS and BABY, JJ.

LA CORPORATION DE ST. JOSEPH, BEAUCE, APPELLANT, and THE QUEBEC CENTRAL RAILWAY Co., Respondent.

Railway—46 Vic. (Can.) Cap. 24.

The Dominion Railway Act, 46 Vic. Cap. 24, has not the effect of abrogating the provisions of the Quebec Railway Act with respect to the local railways to which the Dominion Act applies.

Prohibition to magistrate—not to proceed on complaint of the appellant against the respondent for having obstructed a highway in contravention of the provisions of the Railway Act. The complaint was avowedly taken out under the Quebec Railway Act of 1880. The prohibition was made absolute on the ground that the Quebec Central was a railway which cut the Intercolonial Railroad, and therefore, that, although it was a company existing under a Quebec statute, it had become a work of general interest to Canada, under the provisions of the Act of the Parliament of Canada, 46 Vic. c. 24, and that it had ceased to be governed by the Quebec Railway Act.

RAMSAY, J. This judgment appears to me to be unsound. The local governments have the power exclusively "to make laws in relation to"

"10. Local works and undertakings other than such as are of the following classes:—"

"c. Such works as, although wholly situated within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more Provinces."

Assuming that the Dominion Parliament has in passing the 46 Vic., c. 24, sect. 6, acted within the provisions of the B. N. A. Act, sect. 91, ss. 29, and sect. 92, ss. 10, c., it does not pretend to have annulled all past legislation of the local legislatures with regard to these branch lines. On the contrary, by subsect. 2 (46 Vic.) the previous legislation is expressly reserved, except as regards ss. 5, sect. 15 of the Dominion Railway Act of 1879. I don't see anything else in the 46 Vic. changing the law in respect of the matter before us. Therefore, I think that the Local Railway Act, 1880, is in force, and applies to the railways for which it was framed, and of whose charter it is a part. If Parliament had abrogated the local railway acts we should then have been obliged, perhaps, to decide the question as to the constitutional effect of a general act of that sort. We are to reverse.

Sir A. A. DORION, C.J., did not think it necessary to go further than to say that the provisions of the Dominion Railway Act and the Railway Act of Quebec were substantially the same, and that, therefore, it did not signify which was in force: one of them certainly was. He concurred in the judgment reversing the decision by which the prohibition was declared absolute.

Judgment reversed.

COUR DE CIRCUIT.

MONTREAL, 3 mars 1885.

Coram CARON, J.

DENIS v. DENIS, et DENIS, opposant.

JUGE: *Que bien que le dernier des huit jours requis par l'article 572, C.P.C., pour la publication des avis de vente, soit un dimanche ou un jour férié, ce jour est compté comme un jour juridique.*

Une saisie exécution fut pratiquée en cette cause le 14 février 1885, et les avis de vente furent donnés le même jour pour le 23 de ce mois, le huitième et dernier jour du délai étant un dimanche.

Le défendeur prétendant le délai insuffisant, produisit à l'encontre de la saisie une opposition afin d'annuler par laquelle il alléguait:—

Que la saisie est irrégulière, illégale et nulle.

Qu'elle a été faite le 14 février 1885, qui était un samedi.

Que les avis de vente furent publiés le même jour, fixant la vente pour le lundi, 23 dudit mois de février.

Que le délai entre le jour de la publication des avis, le 14 février et le jour de la vente, le 23 février, est insuffisant en loi, attendu que ce délai a expiré un dimanche et que la vente ne pouvait être fixée pour le jour suivant. Et pour ces raisons, l'opposant concluait à ce que la saisie et tous les procédés sur icelle fussent déclarés irréguliers et illégaux et annulés.

Le demandeur trouvant cette opposition frivole en a demandé le renvoi par simple motion, et la cour a accordé cette motion et rejeté l'opposition avec dépens.

Opposition rejetée.

G. A. Morrison, pour l'opposant.

U. A. Denis, pour le demandeur.

(J.G.D.)

RECENT DECISIONS AT QUEBEC.

Répartition d'église — Repetition.—*Jugé*, que l'homologation, par les commissaires pour l'érection des paroisses, d'une répartition pour construction d'une église, créée en faveur des syndics un titre légal aux sommes qui y sont imposées, et que, tant que cette répartition n'a pas été annulée par une autorité compétente, les personnes qui y sont cotisées ne peuvent pas se refuser au paiement des montants mis à leur charge, ni les répéter lorsqu'elles les ont payés.—*Lemieux v. Syndics de St. David de l'Aube Rivière* (C.S., Casault, J.), 10 Q.L.R. 325.

Assurance mutuelle — Cession.—McD. avait cédé à M. tous ses droits dans une société commerciale qui avait existé entr'eux, à la condition que M. lui paierait \$3,000, qu'il acquitterait toutes les dettes de la société et même les dettes personnelles de McD., et que, jusqu'au paiement des \$3,000, il tiendrait les marchandises assurées et remettrait les polices à McD. Les marchandises étaient lors de la cession, assurées, au nom de McD. seul, à deux assurances mutuelles, par trois polices qui devaient expirer quelques mois plus tard, et que McD. avaient renouvelées à leur expiration. McD. et M. avaient subsequmment réglé de compte, et s'étaient réciproquement donné quittance.

Jugé, 1. Que la cession des marchandises n'avaient pas transporté les polices d'assurance, qui ne couvraient plus, après leur cession, les marchandises dans lesquelles McD. n'avait plus d'intérêt assurable, et que M. ne devait les contributions, pour pertes antérieures à l'expiration des polices, que comme dettes sociales et dettes personnelles de McD.; mais que celles subséquentes au renouvellement des polices n'étaient dues que par McD. sans recours contre M.

2. Que McD. n'avait de recours contre M. que pour les contributions, pour pertes antérieures à l'expiration des polices, qui ne lui avaient pas été déclarées avant le règlement de compte.—*McDonald v. Messier* (Cour de Révision, Casault, Caron et Bourgeois, JJ.) 10 Q.L.R. 329.

Taxes municipales et scolaires—Corporations religieuses.—*Jugé*, que les corporations religieuses, établies pour les fins de l'éducation, sont exemptes de toutes taxes municipales et scolaires, pour les propriétés par elle occupées pour les fins pour lesquelles elles ont été établies et qu'elles ne possèdent pas uniquement pour en tirer un revenu.—*Les commissaires d'Ecole de St-Roch Nord & Le Séminaire de Québec* (C.B.R.), 10 Q.L.R. 335.

Fol enchérisseur — Cautionnement.—B. avait fait saisir sur son débiteur J. B. trois propriétés; W. B. s'était rendu adjudicataire de deux; mais, n'ayant pas payé ses adjudications, B. poursuivait leur revente à la folle enchère du dit W. B. qui, le jour même fixé pour la revente, promit par écrit à B. de payer ses adjudications sous six mois par termes mensuels, et R. et deux autres se portèrent garants, aussi par écrit, que B. serait payé par le dit W. B., et qu'elle ne souffrirait pas de la suspension de la vente. W. B. n'ayant pas payé dans le délai convenu, B. fit revendre les deux propriétés à sa folle enchère, puis elle poursuivit R. et les deux autres pour le paiement de la balance de sa créance contre J. B.

Jugé, que le cautionnement donné par R. et les deux autres n'était que pour le paiement au shérif des adjudications de W. B., et à son défaut, pour celui aux créanciers judiciaires de J. Berryman et à lui-même de la différence entre les enchères de W. B. et les ventes effectives des propriétés, et que B.

n'avait pas d'action personnelle contre R. et les deux autres pour le montant dû par J. B. — *Butler v. Redmond* (En révision, Casault, Routhier, Caron, J.J.), 10 Q.L.R. 337.

Billet promissoire—Considération.—*Jugé*, que l'action prise sur un billet signé par une société qui n'existe plus, peut être maintenue contre un des associés, quoiqu'il soit établi, sur la défense de l'autre, que la société n'a pas reçu de considération pour le billet.—*Rochette v. Rochette* (Révision, Casault, Routhier, Caron, J.J. :—Casault, J. diss.), 10 Q.L.R. 342.

Vaisseau—Saisie—Fraude.—*Jugé*, 1. Que la saisie-exécution, pour dette civile ordinaire, d'un vaisseau sur un autre que le propriétaire enregistré est nulle.

2. Que l'annulation de la feuille ou certificat, qui n'est qu'une preuve du titre, n'invalide pas celui-ci.

3. Que la preuve d'une vente frauduleuse du vaisseau, avant son enregistrement, ne suffit pas pour en valider la saisie, par un créancier du vendeur.—*Darveau v. Cyprien* (C.S., Casault, J.), 10 Q.L.R. 348.

Capias—Affidavit.—*Jugé*, que le demandeur; en jurant que le départ du défendeur lui fera perdre sa dette et souffrir des dommages, dépose, par là même, qu'il lui fera perdre son recours, et que le capias, émané sur un affidavit où les premières expressions ci-dessus ont été substituées au secondes, doit être maintenu.—*Piché v. Bernier* (En révision, Stuart, Casault, Caron, J.J.), 10 Q.L.R. 351.

TREATIES AFFECTING THE BOUNDARIES AND FISHERIES OF CANADA.

At a recent meeting of the Young Men's Association of St. Paul's Church, a paper with this title was read by Mr. R. A. Ramsay, advocate. While it was prepared for delivery to a popular audience and for illustration by maps as it proceeds, we have thought that the information contained will be of interest to our readers, and we give it in the form in which it was delivered. The paper, we think, will be the more acceptable, especially to our Junior Bar, as no narrative of the events alluded to is available in a short comprehensive form.

After some introductory remarks, the paper proceeds as follows:—

As a preliminary I will ask you to glance at the list of Treaties which affect Canada,

first, that with France when Canada was ceded, then those with the United States, and then from out of the many subjects with which those Treaties deal, we will consider certain of them to which we must limit our attention for to-night. Here then is our list. In it I have placed as Nos. 2 and 3 documents which, while not really Treaties, have much to do with one of the subjects for our consideration.

1. Treaty of Versailles.....	10 Feby. 1763
2. King's Proclamation.....	7 Oct. 1764
3. Quebec Act.....	22 June 1774
4. Treaty of Paris.....	3 Sept. 1783
5. Jay's Treaty.....	19 Nov. 1794
6. Treaty of Ghent.....	24 Dec. 1814
7. Convention, London.....	20 Oct. 1818
8. Ashburton Treaty.....	9 Aug. 1842
9. Oregon Treaty.....	15 June 1846
10. Reciprocity Treaty.....	5 June 1854
11. Treaty of Washington.....	8 May 1871

In these Treaties, as may be imagined, a great variety of matters have been discussed and settled, or thought to be settled,—there have been Peace, Slave Trade, Boundaries, Reciprocity, Extradition for Crime, the Fisheries, Claims on each side and of all sorts, the best known, the most recent, being the celebrated Alabama Claims, which were paid for by England on such a liberal scale, and the Canadian Fenian Claim, which was tossed aside so lightly at Washington in 1871. The field is very wide, and for your patience I propose that the limits to which we restrict ourselves be these two branches,—questions of Boundary and those of the Fisheries.

As to the first set of questions, the Boundaries, they are finally settled,—all that could on any pretence have been given away by England on Canada's behalf, to satisfy our grasping neighbours, has been given. There are no open questions, no riddles for solution in doubtful description, the boundary is marked from Atlantic to Pacific, wherever it is a land boundary, by iron posts at short intervals.

As to the Fishery questions on the other hand, they are unfortunately not finally settled, there are several difficult ones which are only sleeping now, they all awake under the termination of the Treaty of Washington, which occurs on 1st July next, by notice from the United States.

The Boundary questions were very lively questions in their day. They are dead now. Those of the Fisheries are alive and, as stated, only sleeping. Let this decide our order and let us consider firstly the dead issues of the Boundaries, and secondly those of the Fisheries of which we will all hear much very soon, when they come up for new and practical consideration.

1.—The Boundaries.

By the first Treaty on the list, made with France after the Conquest of Canada by England—to which of course at that time all

the present United States, then the American Colonies, belonged—France ceded all *Canada*, as then known, to England. Nova Scotia, which then included New Brunswick, was already possessed by England, as was Newfoundland. *Canada* was considered to mean all the country occupied by France, and in addition to what is now Quebec and Ontario, included all the countries south of Lake Erie down to the Ohio and following that river to the Mississippi, then up that river to its source. All the land west of the Mississippi was then called Louisiana, and was not ceded to England, but by a secret treaty was given by France to Spain.

Several months after the peace the Proclamation of 7 Oct. 1764 was issued by the King of England. By it, out of the ceded country, the Province of Quebec was carved. Its boundaries were roughly stated these,—from the head of the Baie des Chaleurs along the height of land between the Atlantic and St. Lawrence to the Richelieu and then along the line of 45° to the St. Lawrence, thence by a direct line to Lake Nipissing, from it to Lake St. John at the head of the Saguenay, then to the St. John River, which falls into the St. Lawrence on its north shore opposite the west end of Anticosti, and then a line across the St. Lawrence round the Gaspé coast and up the Baie des Chaleurs.

These limits, it will be noticed, left all the countries up the St. Lawrence and the Lakes, as well as those of the Ohio and Mississippi, without provision, and apparently treated them as wild fur-bearing territory only without need of control.

Then came the Quebec Act of 1774. This went to the other extreme, and gave the province of Quebec a territory more extensive than could be fairly governed, for, in addition to the province just described, it included all Ontario, the Lakes, the Ohio country and Western lands. Its Western limit was defined in a way which has caused much dispute. It was, after the junction of the Ohio and Mississippi, "thence *Northward* to the limits of the Hudson Bay." *Northward* was the riddle. The dispute was whether *Northward* meant *due north* from the junction, or *Northward-like* up the Mississippi in its course to its source and thence north. In those days the source was thought to be much further north than in reality. From this word *Northward* many disputes have grown; the most recent has been the boundary dispute between Ontario and Manitoba, recently settled, or supposed to be.

In 1818 there was a trial at Quebec of one DeReinhardt for a murder committed near Lake of the Woods, and it was then decided for the due North line, which we have generally seen appearing so curiously on our maps running north, apparently without reason, on the north shore of Lake Superior between

the Nipigon River and Fort William. The recent decision of the Privy Council appears to decide the other way, and yet some think it a decision of Delphi.

It may be stated that in 1772-3-4, prior to the revolution, by an arrangement between Canada and New York, both then British Colonies, the boundary from St. Lawrence to the Connecticut was laid out by two surveyors named Valentine and Collins. Their line was to be the parallel of 45°, but they had apparently imperfect instruments or ability, for they ran the line sometimes north and sometimes south of the true parallel. If the map of this province be looked at, this will be noticed. It was not for many years that the error was discovered, but being ascertained, the defective line has been very properly adhered to, because private rights had been acquired along that line. In Lord Ashburton's Treaty it is referred to not as the line 45°, but the line laid out to represent 45°. By this error and acceptance of it, however, the United States have their important post Fort Montgomery on the Richelieu, near Rouse's Point, somewhat north of 45° on what should have been British ground.

In 1783, the Treaty of Peace, after the American Revolution, was executed at Paris. It was negotiated on the side of the United States by the astute Franklin, Adams and Jay, and on the side of England by a Mr. Oswald, apparently a man of no merit in English politics. This Treaty was the first and great surrender of valuable territory made from inability to appreciate it, and from want of a proper view into the future of America, and, as to boundaries, it gave rise to many troubles. After recognizing the independence of the United States, it proceeded to give the limits of their territories, and gave them boundaries far beyond what they pretended to occupy—far beyond what any colonist of the ordinary type had ever dreamed of. But Franklin was no ordinary man; he saw in those western lands future states, which have since appeared.

The boundary began at the St. Croix, so-called, no river of that name being really then known on the New Brunswick coast—all had Indian names—and when the time came for settlement of the point, there were three or four rivers which disputed the distinction. Then the line was to follow that river to its source, and then due north, it read, to the highlands which separate the rivers flowing into the St. Lawrence from those flowing into the Atlantic (this description we will return to, for from it the long continued Maine boundary dispute arose); then along those highlands to the Connecticut, then along the line 45° to the St. Lawrence, then by the river and lakes to Lake Superior, and then (another disputed part) by a lake which the Treaty called Long Lake,

but which no one in the country had ever heard of, to the Lake of the Woods and its N.W. angle, and then (another error) due west until the line should strike the Mississippi, and then down the Mississippi to the sea. West of the Mississippi was Louisiana, then, and until 1800, Spanish territory. This last line to the Mississippi was soon found to be an impossible one, for no line west from the Lake of the Woods could strike the Mississippi, which was much to the south.

Now consider this Treaty, and what by it England threw away. The old limit of Canada was down to the Ohio. There was little settlement on that river at this time, but the colonists of Virginia claimed it as theirs. It might have been right to cede the Ohio country, but why the west? And why carry the line up to the north at the Lake of the Woods? All that western country was occupied by the posts of the Canadian fur traders, and Royal military forts were at Sandusky, Detroit, Michilimacinae and other points. These had never been captured, or attempted by the Revolutionary forces. The boundary, if given at the latitude of the head of Lake Erie, would have been extremely liberal. Where it was placed was without reason, unjust to the Canadian traders, and entirely due to apathy and ignorance on the British side. While we find long discussions on other parts of the Treaty, some trivial, the books do not give a trace of effort to retain these lands, which now form so many fertile States. The boundary aroused much indignation in Canada, and partly on this account the western posts were not given up to the United States for several years.

Next, in 1794, came Jay's Treaty of Amity and Commerce. By it the boundary in the north-west was to a certain extent settled. By this time the fact that the Mississippi could never be reached by a line west from the Lake of the Woods had been ascertained, and it was settled that the line of 49°, which was known to be about the latitude of Lake of the Woods, should, whether north or south of its N. W. angle, be the boundary; and Great Britain gave up all the posts which her Canadian authorities had held (of course without right, but as a sort of protest) since the Peace of Paris.

Jay's Treaty also provided for the unfortunate St. Croix River competition. Commissioners were appointed to decide which of the claimants was the one meant, and to place a monument at its source. In 1798 they did this in a peculiar way. They decided which was the St. Croix, but where it branched at some distance, because the branch which they admitted was the *main* stream provokingly (for American interests) turned *west*, they (or the majority) decided that the *minor* stream should be the boundary, because its direction was more northerly. The

Commissioners had here overstepped their duty, but Great Britain complacently decided to accept the illegal decision, and yielded a line which proved later of serious effect on the Maine question. It was a lever placed in the hands of the United States diplomatists, which they used on every occasion.

Then came the war of 1812-14, with its varying success, in the ebb and flow of war. In some ways England was unsuccessful, but in the end she held Niagara, Detroit, Mackinaw again, and all the Western Country. She had carried on the war as it were with her left hand, for her right was at the time engaged in the Peninsula. Now that war was victoriously ended. Napoleon was at Elba, and naturally the Americans were anxious for peace, and accordingly they got it by the Treaty of Ghent of 1814. But by this Treaty England, ready for victory, again treating American territory, however extensive, as valueless, agreed to restore all the captured posts, and to revert to the old boundaries of 1783. England knew of many of the disputed lines. She might have avoided all the troubles of the Maine boundary had she retained her conquests, for she had taken Castine and other posts in Maine down to the Penobscot, and should have then settled in a practical manner the Maine boundary at that river; but no, back she went to the old unsettled and disputed and unfair lines. The boundaries were to be as before the war. The great North-West, again retaken, was again to be surrendered as a thing of nothing.

In an effort to settle the Maine dispute on the old description, Commissioners were appointed to proceed to the country and endeavor to find and lay out a boundary. What happened might have been foreseen: they could not agree. The American Commissioner claimed a line which went close up to the St. Lawrence. The British Commissioner claimed one from the source of the St. Croix across to the head-waters of the Chaudiere and Kennebec as being the highlands mentioned in the old Treaty of 1783. No decision could be arrived at, and the question was then referred, in terms of the Treaty, to the King of Holland as arbitrator, to find, if he could, the true line meant by the wording of the Treaty. He spent much time over maps and old documents, and decided that the description of the Treaty was not reconcilable with the state of the country; that, as he said, it was "inexplicable and impracticable," and he recommended the parties to adopt some compromise boundary to settle the question. England agreed to accept a line drawn by him; the United States refused.

Here, to illustrate the force of the arguments on each side, resort must be had to the maps, which show the rivers, and the watersheds or heights which divide the lands which drain into the Atlantic, the Bay of

Fundy, the Gulf of St. Lawrence, the Baie des Chaleurs and the St. Lawrence River respectively.

The difficulty was worse than before. By this time the troubles at the disputed frontier had become very serious. The New Brunswickers and Maine people came in competition and collision in the upper valleys of the St. John and Aroostook. Both governments issued timber licenses in the disputed territory. The danger became more pressing each season.

Attempts at settlement by negotiation were resumed and then occurred to England one of those instances of a neglected opportunity, which, once lost, never returns.

In 1833, when Lord Palmerston was Foreign Secretary, a proposition was submitted on the part of the United States by General Jackson, then President. It admitted, as the King of Holland had decided, that a due north line from the St. Croix was not reconcilable with the other words of the description, and proposed that the line should be drawn from St. Croix to the highlands at the sources of the Kennebec and Chaudiere, regardless of the point of the compass. It did not use these words, but this would have been the effect. The actual terms of the proposal are too lengthy for repetition here. The result of survey by the American proposal would certainly have given the line as now stated. The proposition was later denounced by the hotter Americans as too liberal, but that only proved that it should have been accepted at once. On the contrary, Lord Palmerston pigeon-holed the dispatch for many months and then rejected it, because it did not profess to be made with the consent of Maine. This was not his affair, for had England and the United States come to terms, England could have allowed them to settle the question with the energetic Maine people. The proposition was naturally never renewed.

On the disputed frontier there was something very near to war. This was happily averted by an American officer, who in later years was much sneered at as "Old Fuss and Feathers," but who was a good soldier in his day—General Winfield Scott. He arranged with the British authorities for joint occupation and a funding of the revenues of the disputed territory until some settlement should be made.

At last in 1842 England determined apparently that the matter must be settled at whatever cost, and Lord Ashburton was sent out with the fullest powers to conclude a treaty upon this and many other matters. We will, however, limit ourselves to the matters of boundary.

He was selected partly because of his connection in business with America,—he was of the banking house of Barings,—he had married in America, and knew many leading

people in the States. He was an honourable man, but further was unfitted for his mission. He had had no diplomatic training or experience. He was a good natured but weak man. He whom he had to meet was the astute Daniel Webster, of vigorous and overbearing mind,—a man of great experience in legal ways and diplomatic matters.

Lord Ashburton was fêted for some weeks before he opened his negotiations and reached a state which seems to have made him ready to yield every point to his hospitable entertainers, which his friend Mr. Webster should press; for when the result of the Ashburton Treaty was published it was found that Lord Ashburton had on every point yielded to the overpowering will of his adversary, and that the treaty well merited the term "Ashburton Capitulation" which Lord Palmerston applied to it. From him, however, the expression came with bad grace when it was remembered how he had passed a golden chance a few years before.

By the Treaty Lord Ashburton had settled the Maine question. But how? By an abandonment of the greater and best part of the disputed territory. It was called a compromise, but Mr. Dent has said, it bore a striking resemblance to the immortal Irishman's reciprocity, which was all on one side. True the United States took 5000 square miles less than then claimed by Maine, but the relinquished part was for most part sterile waste. Lord Ashburton gave up a territory of much greater area, in great part fertile and well timbered. It included the valley of the Aroostook and half of that of the St. John which had already become and has since proved itself a district unsurpassed as a lumber country; and with further obligingness he granted the free navigation of the St. John to the sea to the lumbermen of Maine with their timber which should have remained British. And yet what writes Lord Ashburton in one of his letters to Mr. Croker recently published:—"I daresay your little farm is worth the whole pine-swamp I have been discussing."

The boundary now gives a line which makes Maine look like a mouthful bitten out of Canada's cake by a greedy boy. Look at it on the map. See the effect, all plans for the Intercolonial R. R. then in progress across what now became Maine had to be abandoned, the enterprise delayed for years, and the length of the road when built nearly doubled. The insertion of Maine, wedge-like between the provinces, is again coming prominently into notice in connection with the recent proposals for the "Short Line" railway from Montreal to Halifax and St. John.

The signatures to his treaty were barely dry,—Lord Ashburton's fêtes in the U. S. over—and he safely away—when a curious matter came to light, which to most minds, not

American, has tinged that treaty with disgrace for the American negotiator who obtained it, and for the American people who, when the facts were known, adhered to it.

It turned out that while Daniel Webster was professing his own belief and that of the U. S., for a line far north, and taking credit for yielding for the sake of peace, somewhat in his demands—he knew that the U. S. were not entitled to the line for which he pledged their honour and his own—and he knew that he surrendered nothing for peace, but gained, from a facile negotiator, that to which the United States were not entitled. The story of the *red line map* may be known to many here, but I may recall the leading facts.

Several months before the negotiation of the Treaty commenced, Mr. Sparks, the biographer of Washington, while engaged in searching the French archives at Paris for materials for his work, made an important discovery. He found a letter from Benj. Franklin to the Comte de Vergennes, written within a few days after the signature of the original Treaty of 1783 at Paris between England and her revolted Colonies. In this it will be remembered, Franklin was a chief actor. No man knew better than he the precise intentions of the parties. It had been for this reason that, as appears, the Comte de Vergennes, then Prime Minister of France, had written to Franklin, enclosing a map of America, and asked him to mark upon it the boundary line as just settled for the U. S. The letter found by Mr. Sparks was Franklin's reply, returning the map, with the remark that he had marked with a *strong red line* the limits of the U. S. as settled. Mr. Sparks at once saw how important this map would be on the Maine Boundary Question, if it could be found. It was not with the letter. He instituted search further hoping to obtain proof conclusive of the American claim. He found the map at last, but instead of supporting the American claim, as Sparks had hoped, to his horror, it had on it, marked with a *strong red line* a boundary which exactly agreed with the British claim. Sparks hastened, however, to communicate his unpleasant discovery to the authorities at Washington, remarking: "In short, it is exactly the line now contended for by Great Britain, except that it concedes more than is claimed by her. It is evident that the line from the St. Croix to the Canadian highlands is intended to exclude all the waters running into the St. John."

This letter and a copy of the map were communicated to Mr. Webster, who entered upon his negotiations with Lord Ashburton with a full knowledge of Mr. Sparks's discovery, while it was kept a profound secret, until after the execution of the treaty, and then for

very shame might have been kept a secret for years, but that necessity brought it out. This was how it had to come into day light from its hiding. After the genial British envoy had yielded nearly all that grasping Maine had demanded, the Senate at Washington hesitated to give its confirmation to the treaty, as the constitution required. The Senate was urged by the dissatisfied men of Maine to regret it. The opposition was very strong, and while Webster supported his treaty with all his force, he found that the weight of numbers ran against him—"more may yet be gained from England," was the argument for rejection. The division approached and Webster saw the Senate's veto of his treaty at hand. No time was to be lost. The Senate must be "whipped into line," as was said, and in secret session, the letter and the map of Franklin were produced, and Webster's argument was this: "You must ratify my treaty, for we have got by it more than we were entitled to. Refuse my treaty, and with this map, which will soon be known to England, you will never get a boundary so favourable." The Senators looked at the map upon their table, resumed in silence their seats, the opposition in great part evaporated, and in haste the treaty was confirmed.

As to England, what could she do? She had given to Lord Ashburton the fullest powers, he had used them and signed for her. Repudiation even under the circumstances of his deception seemed dishonour and England ratified. It was a woefully bad bargain, but England never dreamed of discrediting her accredited envoy.

Such in brief is the story of the *red line map* and of the disgraceful success of Daniel Webster. When all that has been said in his defence is read one fails to find that he came from that negotiation with any honour left. The efforts made to relieve him by explanations only serve to indicate the weight of odium which the transaction placed upon him.

[To be continued.]

GENERAL NOTES.

A good deal of conflict of opinion exists upon the question what degree of proof is necessary to establish the defence of insanity on the trial of an indictment for homicide; whether the defendant must make his insanity appear by a preponderance of evidence, or whether it is sufficient that he raise a reasonable doubt of his sanity at the time of committing the homicide. In *State v. Jones*, the Supreme Court of Iowa has lately had this question before it; and the judges were divided in opinion. A majority of the court (Rothrock, C. J., and Seavers, J., dissenting) held that the defence must be made out by a preponderance of evidence; that is to say, the defendant, upon whom the burden of proof rests, must turn the scale by evidence which creates a probability that he was insane—*Central Law Journal*.

The Legal News.

VOL. VIII. MARCH 21, 1885. No. 12.

In the case of *Ulrich v. The Hudson River R.R. Co.*, the Court of Common Pleas of New York has made a distinction of some interest between ordinary cars and drawing room cars where the passenger is travelling on a pass. Mr. Ulrich, Commissioner of Emigration, had a pass which entitled him to ride in one of the ordinary cars of the company. The pass contains a stipulation that the person using it shall relinquish his right to compensation for injuries. But Ulrich wished for better accommodation and paid the sum exacted for transportation in one of the drawing room cars forming part of the train. The court held that this changed the contract and made the railroad company responsible. "If the free pass gave him the right to travel on the train, it gave him no right to travel in that car, and it is evident that the rights and relations of the parties were changed by the sale to him of the ticket to the drawing room car. As a passenger for hire, who, in bargaining for transportation in the drawing room car had made no contract that relieved the company from its liability for damages if he were injured through its negligence, the plaintiff had the rights that the law gives to ordinary passengers, and having paid for the ticket he is not to be considered as one who, in consideration of a free passage, has agreed not to hold the company liable for injuries. The defendant voluntarily made a new contract, and cannot now ignore it and insist that the rights of the parties shall be measured by a contract that was intended to operate upon a condition of affairs that it has seen fit to change." The defence that the Wagner Drawing Room Car Company was liable for the damages was held to be untenable, as that company could not run its cars on the road without the consent of the railway company.

The County Court, Cook Co., Ill., has decided, *Re Dong Tong*, that a white male infant cannot legally be adopted by a Chinese

family, even with the consent of the mother of the child. Prendergast, J., said:—"While satisfied that the petitioners are reputable people, I am nevertheless of opinion that there is a barrier against such an adoption of a child who is unable to consent for itself. The fact that the mother of this child, who alone has the sole legal custody of the child, consents, is not sufficient. In every judicial inquiry for the determination of the custody of a minor in which the court has the power and the duty of disposition, the controlling question or consideration is the welfare of the child. All other questions are subordinate to this. Among some of the continental nations of Europe legal adoption of children has been recognized for some time; but in the United States it has been supposed that the common law did not recognize the practice, and made no provision therefor. In this State, as in others, the legal adoption of children is a purely statutory proceeding, and our statute expressly provides that before the court enters the decree of adoption, it must be satisfied, among other things, that the petitioner is of sufficient ability to bring up the child, and furnish suitable nurture and education, and that it is fit and proper that such adoption should be made." The petitioning husband cannot by our law, become a citizen; hence he will probably be, though in the country, not of it. And that being so, it is probable that the home lessons and influences, which are so important to be impressed on the character of the child in the formative period, to fit him for American citizenship will be wanting."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, March 7, 1885.

Before JETTÉ, J.

KNAPP V. THE CITY OF LONDON INS. CO.

Evidence—Privileged Communication.

Held, that letters, communications, and correspondence between an Insurance Company and its Inspector or Adjuster, relating to the preliminary investigation which the company makes in connection with the loss, are privileged communications.

At the Enquête in this cause the plaintiff's

attorney asked Mr. Oswald, who was the defendant's agent, the following question:—"Will you produce and file in this cause the originals or copies of all correspondence, authorizations, and reports which passed between yourself as agent of the defendants and Israel Wood of Sherbrooke, as their adjuster in this matter?"

W. E. Dickson, for defendants, objected to the question, inasmuch as all communications between the company, defendant, and its special adjuster with reference to the preliminary investigation in this matter were privileged communications, and could not be brought into question as being privileged communications between principal and agent. The defendants had no objection to the production of all documents received from the plaintiff or any outside party and not confidential.

PER CURIAM. La Cour maintient l'objection attendu que la correspondance demandée est relative aux renseignements que la compagnie défenderesse a été forcée de prendre au sujet de la réclamation qui fait l'objet du présent litige.

F. W. Terrill for Plaintiff.

Trenholme, Taylor & Dickson for Defendants.

(*W. E. D.*)

SUPERIOR COURT.

MONTREAL, Dec. 27, 1881.

Before RAINVILLE, J.

THAYER v. ROSS.

Bill of costs—Counsel at enquête.

The case was inscribed on the roll for *enquête* and merits. The plaintiff failing to proceed, his action was dismissed with costs. In the bill of defendant's attorneys, taxed against plaintiff, was an item of \$10 for counsel fee at enquête.

The plaintiff moved to revise the taxation, objecting to the item on the ground that no enquête having been made, a counsel fee could not be taxed against him.

Held, maintaining the taxation, that the case having been inscribed upon the roll, the fee was properly taxable.

Geoffrion, Rinfret & Dorion for plaintiff.

Kerr & Carter for defendant.

JURISPRUDENCE FRANÇAISE.

Bail à loyer—Réparations—Reconstruction de la façade—Arrêt du maire—Péril imminent—Faute du propriétaire—Responsabilité.

La clause d'un bail de maison, par laquelle le locataire s'engage à supporter, sans indemnité, toutes les réparations ou constructions, grosses ou petites, ne comprend point l'hypothèse de la reconstruction totale de la façade de la maison louée.

Toutefois, si la démolition de la dite façade a été ordonnée par l'autorité municipale pour cause de péril imminent, il y a là un cas de force majeure, faisant obstacle à l'action en indemnité, à moins qu'il ne soit établi que par des réparations convenables et faites à temps, ce dernier aurait pu conjurer le mal.

(16 juin 1884; *Besançon, Cour d'Appel; Gaz. Pal.* 21 janv. 1885).

Lettre de change—Acceptation—Signature—Radiation—Remise.

Le tiré n'est lié envers le porteur que par la remise effective de la lettre de change, revêtue de son acceptation.

En conséquence, le tiré peut valablement biffer jusqu'à cette remise, l'acceptation qu'il aurait tout d'abord signée.

(11 déc. 1884. *Trib. de Com. de la Seine. Gaz. Pal.* 22 janv. 1885).

Billet à ordre—Signatures de commerçants et de non commerçants—Commercialité du billet—Compétence du tribunal de commerce.

Le billet à ordre, quoique souscrit par un non commerçant, revêt le caractère de commercialité, lorsqu'il porte la signature d'individus commerçants. Par suite, le tribunal de commerce est compétent, alors même que la poursuite n'est dirigée que contre le souscripteur non commerçant.

(26 nov. 1884. *Cour d'Appel de Lyon. Gaz. Pal.* 22 janv. 1885).

Privilège—Médecin—Maladie chronique—Appréciation—Pouvoir du juge.

Lorsque la maladie, dont est mort le débiteur, est une maladie chronique d'une certaine durée, le privilège accordé au médecin par l'article 2101 du Code Civil ne s'étend

pas à la période entière pendant laquelle il a donné ses soins, mais seulement au temps où la maladie a pris un caractère assez grave pour faire redouter une issue funeste; il y a là, du reste, une question de fait, dont l'appréciation est réservée aux tribunaux.

(27 nov. 1884. *Montidier Gaz. Pal.* 24 janv. 1885).

Obligation alimentaire—Etablissement des enfants—Caractères—Personnes tenues de cette obligation.

Si le père de famille est obligé de nourrir son enfant, il n'est point tenu de lui fournir une dot ou un établissement, et il n'est pas permis à l'enfant de dissimuler la demande d'une dot sous l'apparence d'une demande alimentaire, de même qu'il n'est pas permis au père d'étudier l'obligation alimentaire qui lui incombe en soutenant qu'il s'agit d'une demande aux fins d'un établissement.

Ce qui différencie essentiellement l'action alimentaire de l'action aux fins d'un établissement, c'est le besoin de l'enfant qui réclame; l'obligation alimentaire comprend d'ailleurs, outre la nourriture, l'entretien, le logement, le vêtement et les secours médicaux.

Les personnes soumises à l'obligation alimentaire n'en sont point tenues concurremment: cette obligation pèse d'abord sur le conjoint, ensuite seulement sur l'ascendant.

(15 déc. 1884. *Cour d'Appel de Toulouse. Gaz. Pal.* 25-26 janv. 1885).

Exécution des jugements ou arrêts—Séparation de corps—Garde des enfants—Modifications—Compétence.

Les mesures prescrites par un jugement de séparation de corps, quant à la garde et à l'éducation des enfants issus du mariage, sont, de leur nature, provisoires, révocables et susceptibles de recevoir des modifications suivant les circonstances et l'intérêt même des enfants.

Les dites mesures étant d'ailleurs essentiellement comprises dans l'exécution du jugement de séparation de corps lui-même, c'est au tribunal seul, qui les a ainsi prononcées, qu'il appartient de les modifier, alors même que depuis la séparation l'époux contre lequel des modifications sont requises aurait

transporté son domicile hors du ressort du dit tribunal.

Peu importe, d'ailleurs, si ce tribunal a fait ou non, dans son jugement, des réserves expresses à l'égard de l'exercice de ce droit, qu'il tient de la loi.

(8 janv. 1885. *Cour d'Appel d'Orléans. Gaz. Pal.* 25-26 janv. 1885).

Enfant naturel—Succession—Frères et sœurs—Défaut de reconnaissance—Possession d'état conforme à l'acte de naissance—Recherche judiciaire de la maternité—Droit attaché à la personne de l'enfant.

1o. La succession d'un enfant naturel ne peut être dévolue à ses frères et sœurs, qu'autant que tous ont été reconnus dans les formes légales par leur auteur commun.

2o. La possession d'état, même conforme à l'acte de naissance, ne suffit pas pour établir la filiation naturelle.

3o. La recherche judiciaire de la maternité, constituant l'exercice d'un droit exclusivement attaché à la personne de l'enfant naturel, ne peut être intenté que par l'enfant lui-même et n'est pas transmissible à ses héritiers, quand il ne l'a pas exercé de son vivant.

(26 nov. 1884. *Lyon, Gaz. Pal.* 28 janv. 1885).

TREATIES AFFECTING THE BOUNDARIES AND FISHERIES OF CANADA.

[Continued from p. 88.]

Another matter of boundary was settled, of less consequence at that time, for there were no troubles there then, and yet it was again one where Lord Ashburton yielded every mile of country in dispute. By the treaty of Ghent in 1814 Commissioners were to trace the boundary as described in the treaty of Paris of 1783 from Lake Superior to the Lake of the Woods. They met; they disagreed. The British claimed that the line should start from the extreme west end of Lake Superior, at Fond du Lac, now Duluth, and so up to the Lake of the Woods. The Americans claimed the line by the portages. From 1826, when the Commissioners were on the ground, until Lord Ashburton came to Washington, the matter was unsettled. He settled it. He gave away the whole, and there is the boundary on the map, following the through portage route to the North West, and not far from our Pacific Railway. Such was his treaty.

Yet Lord Ashburton was, to judge by his letters in Croker's books, rather pleased with his own exploits and charmed with Webster. He had no resentment towards the man who had deceived him. He was too good-natured. On the contrary, he sent him his portrait, and was pleased to have Mr. Webster name one of his children after him.

Before leaving the Ashburton treaty we must note that the line of 49°, which, as we have seen, was under Jay's treaty the boundary from Lake of the Woods to the Mississippi was now continued as the boundary to the Rocky Mountains.

The Ashburton treaty was somewhat encouraging for further demands by the United States, and without delay they came. From Maine the dispute was transferred to Oregon. As already stated the line had been defined at the line of 49° to the Rocky Mountains. Beyond it was not defined. The country was in great part wilderness. There were British settlements at Vancouver Island. All down the Columbia and through Northern Oregon were posts of the Hudson's Bay Co. But not long before this time, the United States had bought from Spain, California, and then claimed the whole of the west coast of America as under this Spanish purchase regardless of British occupation. Emboldened by previous success they claimed it loudly. Russian America came by Treaty of 1823 down the coast to 54°-40, and immediately the demand of the Californians was made in alliterative form, "54. 40 or fight." The Americans had no occupation in Northern Oregon,—while England had—but that was of no consequence. The cry was "54. 40 or fight." England proposed to divide and to take the line of the Columbia to the sea, but the American answer was "No. 54. 40 or fight."

After much correspondence Mr. Packenham, the British ambassador at Washington, was authorised to treat, and he did so on the plan of Lord Ashburton,—to give all away. He first took the pains to ascertain—for he was a sportsman—that while the Columbia was full of salmon, those fish of the west were so absurd in their habits as to decline to be caught in the true sportsmanlike way—they absolutely refused to rise to the gaudy fly. *Ergo*, the salmon were worth little, the river nothing, and the whole ridiculous country less, and the sooner given away the better. The Americans offered, as in Maine, to yield something. "We will take the line of 49° from the mountains to the sea, and, to show our good nature, we will not mind about the tip of Vancouver Island, which that line would cut off. You may have that." With profound thanks Mr. Packenham accepted the concession and concluded the Oregon treaty of 1846.

After this treaty the boundary along the line of 49°, from the Pacific to the summit of

the Rocky Mountains, was laid down by boundary marks.

Now, one would have thought that all the boundaries were settled. But no, from the Oregon treaty came the San Juan dispute. The treaty declared that the boundary after reaching the sea in 49° should go through the middle of the channel between mainland and Vancouver Island out to sea. There is a group of islands in this arm of the sea, Fuca's Straits, the main one San Juan. Besides several minor channels it turned out there were two main channels, the Haro and the Rosario. The Haro further out and thus giving the islands to the United States and bringing the line near the British town of Victoria on Vancouver,—the Rosario nearer mainland. The United States claimed the Haro and the British the Rosario, as the true channel meant by the treaty. While correspondence was going on, a fire-eating general of the United States, Harney by name, took possession of the Island of San Juan. British war ships were sent out to attend to the matter which had at once a dark look. Again General Scott, for a second time a peacemaker, appeared and arranged pending the settlement for a joint occupation of the Island by troops of each side. This continued until this dispute was, with many others, settled by the treaty of Washington of 1871, and within our own time. It was referred to the Emperor of Germany as arbitrator. He decided for the Haro channel and for the United States, and again the United States got the better of England and has a boundary within sight of Victoria. None can, however, find fault with the decision of the Emperor. England agreed to accept his decision, and he gave it, and at once England withdrew her garrison. Where the English Envoys at Washington erred—but then they followed the previous disputes—was in allowing the question to turn on this: whether the Haro or Rosario was the true channel; for there was a third, intermediate, the Douglas, which more than either had claim to be most fair to both sides and to suit the requirements of the Oregon treaty.

By the treaty of Washington it was provided that the boundary from the Lake of the Woods to the Rocky Mountains should be marked out by a joint commission, and this was soon after done along the line of 49°, and brought into prominent notice on the maps the curious notch in British territory which the possession of the United States to the N.W. angle of the Lake of Woods, as defined by former surveys, gives them.

Thus ends our hasty review of the boundary questions under the various treaties. The retrospect is not a pleasant one. With regard to each treaty the Canadian feeling has been that on each England was too yielding; the value of the territory was not appreciated;

and her diplomatists were outmanœuvred on every occasion. But all is past and the situation must be accepted. The boundary from Atlantic to Pacific is conclusively settled and at least no source of trouble can now arise on that ground.

Let us pass to what is still an open question, and to the other branch of our subject for to-night.

The Fisheries.

Before discussing the Canadian fisheries in relation to the treaties, it will be proper to take a glance at the nature of those fisheries themselves. The main fishery of America is of course the cod fishery of the banks of Newfoundland. This, as well as all open sea fishing, is free to all nations. It is not our exclusive property, nor is the fishing generally over the Gulf of St. Lawrence, nor, in fact, anywhere except within three miles of shore,—which is, by the law of nations, the territorial possession of each people. Within that distance no foreigner can come to fish unless by treaty right or license from the nation of the shore. This is universal law.

Now for the deep sea fishing with any profit, there are required two things. The *first* is the ability to get fresh bait. The bait used consists mainly of a small fish called caplin, of squid and some others. It should be fresh. Fishing schooners from France or the United States cannot bring bait with them which will be of use. These bait fishes are in-shore fish, and it may be said generally that they are only found within the three-mile limit. Thus fishing vessels coming to the banks must first go in-shore to catch or buy a stock of fresh bait, and this must be obtained not too far from the bank fishing grounds. Without the right to get bait in-shore, the bank fishery, which is, as stated, open to all, is nearly valueless. The *second* thing required for successful bank fishing, is the liberty to cure the fish on shore, and pack them for transport to the vessel's home. At sea, naturally, the process of drying and curing cannot be carried on. The fish are merely split and cleaned and salted to preserve them. What is required is that the vessel should go in-shore, land her fish, which are spread upon frames to dry. It has been found that the climate of the coasts of Newfoundland and the Gulf is more favorable than any other for the successful open-air drying of fish. Thus, in order to make her catch useful, a vessel must have the privilege of going in-shore to dry her fish on land, else she might almost as well have remained at home. Again the bankers, as cod fishing vessels of the banks are called, often require to run in-shore to refit damages, get water, and buy stores, salt and provisions. For these reasons the privilege of coming within the three-mile limit

and of going ashore is invaluable to the foreign cod fishers, and yet by our *rights*, we are entitled to exclude them and to preserve these privileges for our own hardy fishermen.

In addition, it must be noted that the waters of the three-mile limit teem with fish which frequent, not the deep waters, but those shallower and warmer limits. Here are the halibut, and, oftener than elsewhere, the mackerel and herring, and many others in abundance.

The right to fish within the three-mile limit is thus itself a valuable right belonging to the people of the shore. Now while all the world has the right to fish upon the banks and open sea, the use of the three-mile limit is practically limited, outside our own people, to the fishermen of France and the United States, because these are the only nations with whom we have treaties permitting the use of the inshore fisheries and of the shore itself. A large part of the fish catch goes to Spain and Roman Catholic countries, and yet no Spanish or other vessels come; for, while they could use the open sea, they have not the needed privileges of the shore.

Although France and her rights are not strictly within the limits of my subject, it seems yet proper to say some words on those rights, which were granted long ago, and have an indirect connection with the matter in hand. These rights resulted in great troubles in Newfoundland. Besides producing constant quarrels between the fishermen, they cause a large part of the coast to be absolutely shut out from development by British energy. This extent of coast is that known as the "French Shore."

The rights arose in the following way:—The treaty of Utrecht was made in 1713. France had been in possession of Newfoundland, but some of her forts had been taken by England during the recent war. By the treaty France ceded the island to England, but retained Canada. France pressed, in the interests of her hardy fishermen, who had frequented the banks for a century or more, for a continuance of a share of the fishery privileges of the island, and England conceded them to this extent; the inshore fishery in common with British fishermen was granted on all the coast from Cape Bonavista on the east, round the north of the island to Cape Riche on the west, and the right to land and dry fish on that shore was given *exclusively* to the French. The English, to avoid quarrels, which were common, restricting themselves to the other parts of the coast. It must be remembered that at this time, and until 1763, Canada and Cape Breton still belonged to France.

Thus matters stood till 1763, when by the treaty of peace made then (about the same time as the treaty with the U.S.) the French

rights were modified, but merely in this, the limits were made from Cape St. John, on the eastward, round by the north to Cape Ray on the west. That is the "French Shore" of to-day. England, however, undertook to remove such settlements as had been made on that coast and to prevent any new ones, and to leave the shore to the exclusive use of the French fishermen for drying fish, their nets and other such uses. This right has been retained in all subsequent treaties, and the French hold and exercise it to-day, much to the detriment of a large part of the Newfoundland coast. No mining can be done there: no fishing hamlets dot the coast. If a vessel goes ashore there when the fishermen have returned to France, she goes upon an uninhabited land.

Such are the French rights. Now let us consider those of the Americans.

Before the war of independence all British colonists enjoyed equal privileges in fishing, but at the close of that war, it became a question how far such privileges should be restored to those who had separated from the British Crown. The matter was very fully discussed in the negotiations which preceded the treaty of Paris of 1783, and though Great Britain did not deny the right of Americans to fish on the banks, or in the Gulf of St. Lawrence, or elsewhere in the open sea, she denied their right to fish in British waters, i. e., the three miles from shore, or to land on British territory, for the purpose of drying or curing the fish. A compromise was at length arrived at, and it was agreed that United States' fishermen should be at liberty to fish on the coast of Newfoundland, but not to dry or cure their fish on that island; and they were also to be allowed to fish on the coasts of the other British possessions, and to dry and cure their fish in any of the unsettled bays of Nova Scotia, the Magdalen Islands, and Labrador, so long as they should remain unsettled; but so soon as any of them should become settled, the Americans were not to use them without agreement with the inhabitants.

It will, however, be observed that the rights conceded to the American fishermen, under this treaty were by no means so great as those which, as British subjects, they had enjoyed previous to the war of independence, for they were not to be allowed to land to dry and cure their fish on any part of Newfoundland, and only in those parts of Nova Scotia, the Magdalen Islands, and Labrador, where no British settlements were found.

So matters stood until the war of 1812, when, naturally, the right of Americans to fish in British waters, and to dry and cure their fish on British territory, terminated. In the negotiations which preceded the peace of 1814, at Ghent, this question was revived, and an alleged right of Americans to fish and cure

fish within British jurisdiction was fully discussed. At that time, however, the circumstances had very considerably changed since the treaty of 1783. The British possessions had become more thickly populated, and there were fewer unsettled bays in Nova Scotia than formerly. There was, consequently, greater risk of collision between British and American interests; and the colonists and English merchants engaged in the fisheries petitioned strongly against a renewal of the privileges granted by the treaty of 1783, to the American fishermen.

At Ghent, the British Government stated that "they did not intend to grant the United States, *gratuitously*, the privileges formerly conceded to them by treaty of fishing within the limits of British territory, or of using the shores of the British territories for purposes connected with the fisheries." They contended that the claim advanced by the United States of immemorial and prescriptive right, was quite untenable, inasmuch as the Americans had, until the revolution, been British subjects, and that the rights which they possessed formerly, as such, could not be continued to them after they had become citizens of an independent state. Accordingly it was agreed to omit all mention of this question from the treaty.

Orders was now sent out that, while not interfering with American fishermen engaged in fishing on the banks, in the Gulf of Saint Lawrence or on the high seas, they were to be prevented from using British territory for purposes connected with the fisheries, and to be excluded from the bays and coasts of all the colonies. The result was the capture of several American fishing vessels for trespassing within British waters. Then the United States in 1818 proposed that negotiations should be opened for the purpose of settling the disputed points which had arisen in connection with the fisheries. Commissioners were accordingly appointed by both parties to meet in London, and the convention of 20th October, 1818, was eventually signed.

Article I of this convention is, with slightly curtailed expressions, as follows:—

Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry and cure fish on certain coasts, bays, &c., of His Majesty's dominions in America:—*It is agreed that* the inhabitants of the said United States, shall have *forever*, in common with the subjects of His Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands; on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands (these are at the northern end); on the shores of the Magdalen Islands, and also on Labrador from Mount Joly, through the Straits of Belle

Isle, and thence northwardly; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, &c., of the said southward part of the coast of Newfoundland, i.e., Cape Ray to Rameau Islands, and of the coast of Labrador; but, so soon as the same, &c., shall be settled, the right to cease. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on or within three marine miles of any of the coasts, bays, &c., of any of His Majesty's dominions not included within the above-mentioned limits. *Provided*, however, that the American fishermen shall be admitted to enter such bays, or harbours for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. *But* they shall be under such restrictions as shall be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever, abusing the privileges hereby reserved to them.

Under this convention arose what is known as "the headland question," which has been the subject of lengthy dispute. England, following the contentions of the United States, insisted that, under the convention, the three mile limit, in the case of large bays, extends from "headland to headland," and does not follow the sinuosities of the shore. England claims thus that the whole Bay of Fundy, the Baie des Chaleurs, and Miramichi Bay are excluded from American rights. I must own that, if the matter stood alone, I am not impressed with the British view, which appears to rest on very fine verbal criticism of the convention, but it is fairly contended that the convention must be construed as regards British bays, as the United States at the time contended and still contend in respect to their bays. Now they have constantly contended that the great bays of Massachusetts (Cape Cod to Cape Anne) Delaware and Chesapeake are *domestic* bays, as they call them, and not open to foreign fishing. Our neighbors cannot, while they hold this view, dispute the British position on the Nova Scotia bays.

During this period American vessels were occasionally captured for fishing in our large bays, and much diplomatic correspondence and international friction ensued on this headland question. This was the state of affairs until 1847, when negotiations were opened between the two Governments for the establishment of reciprocal free trade between Canada and the United States, coupled with the concession of some fishing privileges to the United States' fishermen. Much correspondence passed on the subject, but, owing to difficulties connected with the question of tariff, the United States appeared

anxious to have the fisheries question dealt with separately, but to this the British Government would not assent.

At last in 1854, Lord Elgin, when in Washington, negotiated a treaty. This is known as the Reciprocity treaty of the 5th June, 1854. Its main provisions were as follows:—British waters on the east coast of North America were thrown open to United States' fishermen, and United States' waters north of the 36th degree were thrown open to British fishermen; excepting always the salmon and shad fisheries, (which were reserved to the subjects of each country);—certain articles of produce of the British colonies and of the United States were admitted to each country, respectively, free of duty. The treaty was to remain in force for ten years, and further for twelve months after either party should have given notice to the other of its wish to terminate the same.

From 1854 until 1865 the Reciprocity treaty continued in force, and no further difficulties appear to have arisen on questions connected with the fisheries; but in that year, 1865, the United States informed the British Government that at the expiration of twelve months the Reciprocity treaty was to terminate.

Efforts were made by England towards a renewal of the treaty, but these, from various reasons, proving unsuccessful, the treaty came to an end on the 17th of March, 1866; and as a consequence the American privileges under it lapsed, and reverted to those of the convention of 1818.

In the meantime a notice had been issued by the Canadian Government warning the American fishermen that their right to fish in British waters would cease on the above date, and it became necessary to consider what measures should be adopted for the protection of British rights.

Eventually it was decided that American fishermen should be allowed during the year 1866, to fish in all Canadian waters upon the payment of a nominal license fee, to be exacted as a formal recognition of right. This system, after being maintained for four years, was discontinued, owing to the neglect of American fishermen to provide themselves with licenses, and in 1870 it became necessary to take strict measures for the enforcement of British rights.

The result of these measures was the capture and forfeiture of several American vessels for infringing the provisions of the convention of 1818, both by fishing within British waters, and by frequenting Canadian ports for objects not permitted by the convention.

The difficulties caused by these events subsequently led to the re-opening of negotiations for the settlement of questions connected with the fisheries, and they formed

part of the matters decided by the treaty of Washington of 1871.

In that general settlement of disputes the American fishermen obtained the use of the inshore fisheries all along the British coasts of Newfoundland, Nova Scotia, New Brunswick, and Quebec, with right to land and cure fish at any place so long as they did not interfere with private rights. The English fishermen obtained the right to fish on the American coast down to the line 39°, i.e. the Delaware,—a barren privilege—and reciprocal free trade in fish and fish oil was agreed to. The latter was a valuable privilege for the Canadian fishermen, as it gave them the American market for the results of their toils. The treaty was for ten years, *plus* two years from notice from either side of desire to cancel. It was, of course, known that the Canadian fisheries, given up for ten years *plus* two, as the minimum time under the treaty, were much more valuable than the rights granted to Canadians, and, as we all remember, the Halifax Commission was appointed to determine upon a sum to be paid by the United States for the surplus value of privileges. After a long examination the arbitrators awarded to Canada the sum of \$5,500,000, which, after some shabby demur and shameful charges against the distinguished Belgian ambassador, M. Delfosse, who was the umpire, was ultimately paid.

The treaty, in its fishery clauses, went into operation 1st July, 1873, and continues at present in force. During these years there has been rest. No seizures of interloping American schooners, no disputes on the headland question, and this might have continued, but that the United States, acting on the dictation of the American fishing interests, which desire to keep Canadian fish and oil from their market, have given the notice prescribed by the treaty to terminate it, and it expires on 1st July of this year. Then all the rights granted by the treaty of Washington in 1871 *end*, and the rights of the Americans go back to the restrictions of the convention of 1818, with all its attendant difficulties. The Americans will have no right to fish within the three-mile limit, except on the part of Newfoundland, already described, viz., from the Rameau Islands on the south coast to the Quirpon Islands at the north end, part of Labrador and the Magdalen Islands; and the only place for landing to cure fish will be the small part of Newfoundland coast on the south from Cape Ray to the Rameau Islands, and a part of Labrador. Then revives, of course, the great headland question, which slept during the period of the Reciprocity treaty, as well as that of Washington.

All this will be upon us very soon. July is not far away. Yet it is difficult to prophesy what will occur. A new treaty is in every way desirable, and yet we must see to it that it is

not to be a treaty of sacrifice. It will doubtless be found that our government and that in England, are already in correspondence with Washington on the matter; for though our premier has recently spoken strongly against the propriety and possibility of doing anything towards a new reciprocity treaty, in view of the numerous refusals which have been given, that does not preclude some arrangement of the fisheries independent of reciprocity in general, as well as independent of the present reciprocity in the fish and oil trade.

In the opinion of many a new fishery treaty is merely a matter of price. It has been said that the notice to terminate the present treaty has been given by the United States in order to prevent the Halifax award from forming the basis for annual payments beyond the twelve years provided as a fixed term by the treaty. They feared, it is said, that the award of \$5,500,000 would be claimed by Canada as the fixed basis of value of twelve years' privileges, and that they would be called upon to pay one-twelfth of that sum per annum for the future. It is well known that the United States have always, wrongly we confidently think, contended that the award was excessive, and in that view a desire to obtain, if possible, a new measure of value, is not unreasonable.

While we cannot predict any particular course, we can feel confident, I think, that the times have greatly changed since the days of Oswald in Paris, in 1783, of Lord Ashburton in 1842, and Mr. Packenham in 1846, at Washington, and that we will hear of no more sacrifices in ignorance of the values of colonial rights. We live in different days, and, within recent years the point of view from which Canada is regarded in England has changed, information is more exact and general, and full value will be had for those possessions,—those valuable possessions, in connection with our fisheries, in which our American neighbours wish so much to share.

GENERAL NOTES.

The following advertisement is mentioned by "Geo. Eliot" as having just appeared in the *Times*:—"To gentlemen, a converted medical man, of gentlemanly habits and fond of Scriptural conversation, wishes to meet with a gentleman of Calvinistic views, thirsty after truth, in want of a daily companion. A little temporal aid will be expected in return. Address Verax!"

It is a somewhat unusual thing for a reigning Sovereign to appear in a witness-box at a police court. The other day, however, the King of Italy, from good-natured motives, volunteered his testimony before a magistrate in Rome. A shopkeeper named Maranzoni had unfortunately injured a little girl by riding over her in the street, and King Humbert, who had witnessed the accident, came forward to say that in his opinion Maranzoni had been in no wise to blame, and that, in fact, his horse had run away with him.

The Legal News.

VOL. VIII. MARCH 28, 1885. No. 13.

In rendering judgment in the recent case of *Goldring & La Banque d'Hochelaga*, in the Court of Queen's Bench, attention was directed to the fact that since the decision in *Molson & Carter* (6 L. N. 189), no step has been taken by the Provincial Legislature to remedy the defect which was discovered to exist in the Code of Procedure. In *Molson & Carter* it was held, more than three years ago, that inasmuch as the Code of Procedure failed to attach any penalty whatever for not filing the statement required by Art. 766, the penalty provided by Art. 2274 of the Civil Code and by ch. 87 of the Consolidated Statutes of Lower Canada, sec. 12, s.s. 2, cannot be enforced. This decision has been confirmed by the Privy Council. It was remarked by the Chief Justice and Mr. Justice Ramsay that although numerous amendments to the Code of Procedure have been introduced at each session, no effort whatever has been made to remedy the defect then discovered. The inference is that the Legislature have acquiesced in the law as it was then stated, although the judges unanimously regretted that such a defect should have been permitted to exist.

The *Albany Law Journal* says:—"There is one species of Anglo-mania that ought to be encouraged in this country, and that is the imitation of the English dealing with criminals and their administration of criminal law. As we learn from the London *Law Times*, at the recent Lewes Assizes, Lord Coleridge made some observations as to the general diminution in crime in England and Wales, as shown not merely at these assizes, but by the returns for the last ten or twelve years throughout the country. 'When I recollect,' said his lordship, 'what assizes were when I was a young man, and observe that notwithstanding the more frequent gaol deliveries, the actual number of persons in the prisons of England has for the last ten or twelve years steadily declined, it is a matter

on which we may heartily congratulate ourselves. We must not make too much of it, as it may have arisen from a concurrence of causes which may not be permanent; but for the present, at all events, it is satisfactory to find that upon returns which cannot deceive, and which include the whole of the prisoners in England and Wales, there has been a steady diminution in crime for the last ten or twelve years.' Mr. Justice Denman also, at Derby, said that judges in many parts of the country had noticed that crime was diminishing in England. So far as the Midland Circuit was concerned, he was happy to give the strongest confirmation to that view. If he might judge from what had happened in every one of the counties in which he had been holding assizes during the last month or so, it was certainly the case that the fewness and mildness of offences, as compared with other occasions within his memory, gave every reason for congratulation."

THE LAW OF EVIDENCE.

The following communication from Mr. Justice Ramsay appears in the *Gazette*:—

SIR,—In your issue of this morning you give the result of the division on Mr. Cameron's bill, "An act further to amend the law of evidence in criminal cases," with an amendment, proposed by the author of the bill, to the effect that "in case the accused does not tender himself as a witness, no observation shall be allowed to be made by the prosecutor or prosecuting counsel upon that fact to the prejudice of the accused." The bill evidently recommends itself to a certain class of minds, because it is a novelty. It is against the whole experience of the world. We can scarcely hope to rescue "remote antiquity" "from the ravages of modern ingenuity," and still less to induce abstract theorists to follow a general argument; but it is worthy of note that Mr. Cameron, by his amendment, has admitted a great mischief that would arise from his reform, and he suggests a remedy to the inconvenience which is impractical in the extreme. How is it possible for the prosecution to be prevented from intimating to the jury what the law is on such a point? If the prosecution

did tell the jury how the law stood, the court could hardly tell the jury that the legislature had been too wise to pass Mr. Cameron's bill, and that it was not law. Again, suppose the defence, presuming on the ignorance of the jury, said the prisoner's mouth was shut, is silence still to be imposed on the prosecution? And is the court to appear to acquiesce in the mis-statement? Besides, the jury might know the law, and then the silence of the prosecution and of the court would not get the prisoner out of the difficulty Mr. Cameron's reform had created for him.

The strength of the reasons urged in support of the bill may be gathered from one advanced on the previous debate. It was said the principle of the law was admitted already in cases of assault, and therefore it should not be refused in murder. It must strike every one who thinks, that the greater the forfeit the greater will be the temptation to commit perjury, and therefore this reason is fallacious. In addition to this, it is hardly compatible with the argument used when the law was changed before as regards assault. Then we were told that the change could do no great harm in cases of assault, which were little more than civil proceedings.

Your obedient servant,

T. K. RAMSAY.

Montreal, March 12, 1885.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, March 4, 1885.

Before RAMSAY, J.

REGINA V. TASSÉ.

Libel—Criminal Prosecution—Evidence—Guilty knowledge—Journalist—Privilege.

RAMSAY, J. The indictment is drawn under Section 2 of the act respecting the crime of libel (87 Vic., c. 38),—that is to say that the libel was published by defendant, knowing the same to be false.

The defendant pleaded the general issue and a special plea of justification.

The prosecution closed its evidence and the defendant opposed the case going to the jury for two reasons: first, that the indictment

was under the second section of the act, and that there was no evidence of guilty knowledge; second, that the communication was privileged on the face of it, and no evidence of express malice to destroy the privilege, and that as privilege was matter of law, the jury should be charged to acquit.

With regard to the first of these points, it seems to me to be a little premature to bring it up at this moment, and perhaps it may never arise in this case. It will be observed that the alleged libel consists in an appreciation of facts with which the writer, whoever he was, pretended to be familiar, and consequently, it can hardly be said there is nothing in the way of evidence to show that the writer knew the nature of his appreciation, that is whether false or true. I am not however prepared to say with the prosecution, that evidence of malice sustains the allegation of guilty knowledge. The converse is true; guilty knowledge implies malice. But in any case I am not inclined to think that, even if guilty knowledge were not proved, it would be the duty of the Court to instruct the jury that the defendant was entitled to an acquittal. 1 Taylor, § 214.

On the second point I am against the defendant. Privilege justifies the publication of incriminatory matter which, under other circumstances, would be slanderous or libellous; but the fact that a person occupies a public position does not confer on his neighbour the privilege of making an injurious attack upon his character. Nor can it be contended that the writer in a newspaper stands on a more favorable footing than any one else. The journalist is only a self-constituted critic, and the difference between him and other critics is, that he should be held to a greater degree of responsibility, because his opportunities to do injury are greater.

Had there been a privilege such as that contended for, the 6 and 7 Vic., c. 96, would have been unnecessary. However, that statute did not extend the law of privileged communication. It created a new defence to libel on certain conditions. It permitted the defendant to plead, together with or without the plea of "not guilty," the special plea that the matter complained of was true, and that it was for the public benefit that the matters

charged should be published. Except in so far the law of libel remains unchanged, and the truth could not be enquired of and could consequently be no justification or even a beginning to a justification.

In this case the special plea has been put in and it raises two questions of fact—namely that the statement complained of is true and that it was published for the public benefit. These two questions of fact the jury, and not the court, must decide.

Geoffrion, Q.C., for the prosecution.

Kerr, Q.C., Church, Q.C., and Lacoste, Q.C., for the defendant.

COUR DE CIRCUIT.

MONTRÉAL, 27 février 1885.

Coram DOHERTY, J.

BRUNELLE V. BROUSSEAU.

Termes—Election municipale—Contestation—Présentation de la requête—Délai.

Jugé :—Que dans le District de Montréal, depuis le statut de Québec, 46 Vict. chap. 26, sections 1 et 2, il n'y a plus de termes pour la Cour de Circuit, et que, par conséquent, une requête en contestation d'une election municipale, qui d'après l'article 351 du Code municipal doit être présentée durant le terme de la cour qui suit le jour de la nomination, peut être reçue après ce délai.

Le 12 janvier 1885, une élection a eu lieu dans la municipalité de la paroisse de Chambly, et le défendeur Brosseau a été élu conseiller municipal.

Le 11 février dernier, le requérant Brunelle fit signifier au défendeur une requête demandant la nullité de cette élection, et le 17 du même mois, il la présenta au tribunal.

Le défendeur à l'argument souleva la question préliminaire suivante :

Il prétendit que d'après l'article 351 du Code municipal, cette requête aurait dû être présentée pendant le terme du mois de janvier ou le plus tard le premier jour du terme de février.

Cet article se lit comme suit :

"Nulle telle requête ne peut être présentée ni reçue, après la clôture du premier terme de la Cour qui suit le jour auquel la nomination contestée a été faite.

"Néanmoins si la nomination a été faite dans les quinze jours précédant tel premier terme, la requête peut être présentée le premier jour du second terme."

L'intimé cita à l'appui de son opinion la cause de *Lavoie v. Hamelin*, 5 Legal News, p. 94.

Le requérant a soutenu, que d'après le ch. 26, Sect. 1 et 2, 46 Vict., il n'y a plus de termes pour le District de Montréal. Que tous les jours juridiques sont des jours de terme, et que, par conséquent, les jours où la Cour siège ne constituent pas un terme de cette Cour.

La Cour donna gain de cause au requérant, reçut la requête et en ordonna la preuve.

Pelletier & Jodoin, avocats du requérant.

Préfontaine & Lafontaine, avocats de l'intimé.

(J.J.B.)

SUPERIOR COURT—MONTREAL*.

Chemin de fer—Constructeur—Droit de rétention—Privilege.—Jugé : Que le constructeur d'un chemin de fer n'a aucun droit de rétention sur les travaux par lui exécutés, à moins qu'il n'ait acquis et conservé le privilège que lui accorde l'article 2013 C. C. sur la plus-value qu'il a donné aux immeubles.—*La Banque d'Hochelaga v. The Montreal, Portland and Boston Ry. Co.*, et *Raymond*, opposant.

Saisie-revendication — Gardien volontaire — Possession—Enlèvement par le défendeur—Intervention—Frais. Jugé : 1o. Que quoiqu'un gardien volontaire ait consenti à laisser le défendeur en possession des effets saisis, il peut néanmoins réclamer les dits effets par voie de saisie-revendication lorsqu'il a des justes raisons de craindre que les biens sont en danger de disparaître, et que le défendeur refuse de les lui remettre.

2o. Qu'un tiers qui intervient dans cette saisie-revendication pour réclamer la propriété de certains effets, n'a droit à aucun frais contre le demandeur qui admet son intervention excepté quant aux frais ; le défendeur devra payer les frais de l'intervention et les intervenants ceux de contestation.

* The above cases will appear in full in the M. L. R., 18. C.

Dupaul v. Wheeler, et Wheeler, intervenant. (En révision).

Compagnie de chemin de fer—Constructeur—Possession—Droit des propriétaires des terres expropriées—Acte des chemins de fer de Québec. Jugé : 1o. Que d'après l'acte des chemins de fer de Québec, les compagnies acquièrent la propriété des terrains nécessaires pour faire leur chemin de fer, en les marquant sur les plans prescrits par la loi et en payant l'indemnité fixée à l'amiable ou par arbitrage, et qu'il n'est pas loisible aux propriétaires de refuser de céder leur propriété.

2o. Que lorsqu'ils ont volontairement laissé la compagnie prendre possession de leur terrain et y construire un chemin de fer, ils ne peuvent plus en réclamer la propriété et s'en faire restituer la possession, mais ils peuvent en justice réclamer l'indemnité représentant leur propriété.

3o. Que lorsqu'un entrepreneur de chemin de fer convient avec une compagnie de construire un chemin, et d'acheter à cette fin, au nom de la compagnie, les terrains nécessaires, la possession qu'il acquiert ainsi n'est pas propre à lui-même, mais est celle de la compagnie.

4. Que même dans le cas où les propriétaires ou l'entrepreneur auraient le droit de rentrer en possession des dits terrains, ils ne pourraient le faire sans avoir offert à la compagnie de lui laisser enlever le chemin de fer construit sur ces terrains par elle ou ses créanciers ou sans offrir d'en payer la valeur.—*La Banque d'Hochedaga v. The Montreal, Portland & Boston Railway Co.* (En révision).

Vente à l'encan—Action hypothécaire—Privilèges—Impenses. Jugé : Que la clause d'un contrat de vente à l'encan, par laquelle le vendeur stipule que son acquéreur parachèvera les ouvrages en voie de construction sur l'immeuble vendu, ne fait pas obstacle à ce que cet acquéreur, poursuivi sur action hypothécaire, réclame un privilège pour ses impenses.—*Leprohon v. DeBellevue, et Prudhomme*, opposant.

Qualité pour poursuivre—Police d'assurance—Nullités résultant du non-envoi de la police—Application de l'article 19, C.P.C. Jugé : 1o. Que

lorsque rien ne fait voir au dossier qu'une corporation étrangère n'a pas le libre exercice de ses droits dans la Province de Québec, cette corporation ne peut poursuivre devant nos tribunaux au nom d'un agent, ce dernier fut-il dûment nommé *receiver* de la dite corporation, et eût-il, d'après les lois de la Province d'Ontario, le droit de recouvrer en sa qualité devant les Cours de justice, les créances dues à la corporation.

2° Que le fait que le demandeur esqualité n'a pas prouvé que la compagnie d'assurance qu'il représente ait jamais transmis au défendeur une police d'assurance, rend nul l'application du défendeur, le reçu temporaire et le billet de prime. *Giles ex qual. v. Jacques*.

Intervention—Séparation de biens obtenue en France—Déclaration requise de la femme séparée de biens. Jugé : 1o. Que la demande en intervention de l'intervenante sera rejetée, parce qu'elle n'a pas fait publier en temps utile, la déclaration requise des femmes séparées de biens et n'a pas prouvé que les effets saisis fussent sa propriété.

2o. Qu'une séparation de biens entre mari et femme, obtenue devant les tribunaux de France, vaut ici, comme si elle eût été obtenue devant nos tribunaux.—*Goudron v. Lemonier, et Guyot, Intervenants*.

Capias—Saisie-arrest avant jugement—Contestation séparée—Affidavit—Renvois et rétours—Recel et soustraction frauduleux. Jugé : 1o. Qu'un seul affidavit contenant les allégations requises suffit pour l'émission, dans la même cause, d'un bref de *capias* et d'un bref de saisie-arrest avant jugement ; et que des mots rayés et des renvois non déclarés ne rendent pas nul cet affidavit.

2o. Que lorsque par sa déclaration sur la saisie-arrest, le demandeur ne conclut à aucune condamnation nouvelle, et qu'il requiert simplement que cette demande soit jointe à l'action principale, le défendeur ne peut produire deux défenses, et la dernière sera rejetée sur motion avec dépens.

3o. Que la vente et l'enlèvement de ses effets par le défendeur, le soir, à l'insu du demandeur et à son détriment, et son refus de payer le demandeur et de lui dire où il avait transporté ses dits effets, constitue à l'égard

de ce dernier, un recel et une soustraction des biens du défendeur justifiant un recours par *capias* et saisie-arrest, quand même une partie du produit de la vente aurait été employé à payer une créance privilégiée.—*St. Michel v. Vidler.*

Quebec License Act of 1878 (41 Vic., c. 3)—Action under Sections 95, 96, 97—Notice to Tavern-keeper—Damages.—Held.—That in an action under sections 95-97 of the Quebec License Act of 1878 (41 Vict., c. 3), it is sufficient to prove that a notice in writing was delivered to the tavern-keeper, and that he knew that the person named in such notice was the person to whom he sold liquor. The inability of the tavern-keeper to read will not relieve him from responsibility under the circumstances.—*Cayionnette v. Girard.*

Carrier—Railway—Conditions of Bill of Lading—C. C. 1876.—The railway company, defendant, received a case of goods from the plaintiff's agent at Winnipeg, consigned to the plaintiff at Montreal, and issued a bill of lading, among the conditions of which were that the company would not be responsible for loss by fire, or while the goods were not on the defendant's railway. The plaintiff's agent at Winnipeg signed a shipping bill requesting the company to receive the goods on these conditions. The goods were destroyed by fire on a steamer running from Port Arthur through Lake Superior—a route connecting two portions of the defendant's railway, but the steamer was not under defendant's control. *Held.*—That the conditions were reasonable, and that the plaintiff had sufficient notice and was bound thereby, and the company were relieved from responsibility, in the absence of any averment or proof that the loss was caused by the fault of the defendant or of those for whom it was responsible *Dionne v. The Canadian Pacific Railway Co.*

Femme séparée de biens et marchande publique—Sûreté collatérale—Cautionnement—Endossement.—Jugé.—Qu'une femme séparée de biens et marchande publique n'a pas le droit d'entasser un billet reçu dans son commerce, et de le transporter, comme sûreté collatérale, à un créancier de son mari; ce billet ne pourra

servir de base en loi à aucun recours du dit créancier contre la femme.—*Martin v. Guyot.*

Preuve testimoniale—Société Commerciale—Échéance—Intérêts.—Jugé. : 1o. Que l'existence d'une société commerciale peut être prouvée par témoin vis-à-vis des tiers, mais que cette preuve n'est pas permise entre les associés.

2o. Qu'en matière commerciale, l'intérêt peut être chargé sur un compte de marchandises à partir de l'échéance du délai convenu sans autre mise en demeure.—*Rowan v. Massé.*

Biens d'un failli—Vente—Résolution de vente—Folle enchère—Compensation.—Jugé. :—Que lorsque les biens d'un failli sont vendus sur une soumission, et que l'acheteur refuse, sans raison, d'en payer le prix et d'en recevoir la livraison, la vente est résolue de plein droit après la mise en demeure de l'acheteur, et le vendeur peut, après les avis nécessaires, faire revendre les effets à la folle enchère de l'acheteur et à ses risques et périls. Dans ce cas, la différence du produit de la vente compensera ce que ce dernier aura payé comptant.—*Desmarais v. Picken.*

Bref de sommation—Amendement—Substitution du défendeur.—Jugé. :—Que l'on ne peut par amendement à un bref de sommation substituer un défendeur non décrit au dit bref à un de ceux qui s'y trouvent déjà.—*Chisholm v. Langlois.*

Désistement—Plaidoyer—Frais.—Jugé. :—Que lorsqu'un demandeur intente une action contre deux personnes faisant affaires en société, et ensuite se désiste de son action et déclare ne la poursuivre que contre l'un d'eux personnellement, le défendeur pourra sur motion obtenir la permission de plaider *de novo*, et l'instance sera suspendu jusqu'à ce que le demandeur ait payé les frais taxés sur le désistement.—*Ib.*

Dette alimentaire—Épicerie—Insaississabilité—Legs à terme—Droit acquis.—Jugé. :—1o. Que des biens légués comme aliments avec clause d'insaisissabilité peuvent être saisis par un créancier d'une dette alimentaire, *v. g.*, pour effets d'épicerie vendus et livrés au légataire.

20. Qu'un legs d'une rente annuelle dont la moitié seulement est payable pendant la minorité du légataire, et dont l'autre moitié doit être capitalisée et payée, avec le total de la rente, à l'âge de majorité du légataire, est un legs à terme et un droit acquis transmissible aux héritiers. (C. C. art. 902).—*Prescott v. Thibeault*.

Privilege—C. C. 2006—*Commercial Traveller*.—*Held*:—That the word "clerk," in Article 2006 of the Civil Code, includes a commercial traveller whose services were also required in the store of his employer containing the goods on which the privilege is claimed.—*Harris v. Hyneman*.

COURT OF QUEEN'S BENCH.

MONTREAL, March 20, 1885.

Before DORION, C. J., MONK, TESSIER, CROSS, and BABY, JJ.

Ex parte DAME KATE FRANCES MONJO, Petitioner, *Rev. FATHER LOUAGE*, Respondent, and DOMINGO M. MONJO, Intervenant.

Habeas Corpus ad subjiciendum—*Security for Costs*.

On an application for a writ of *habeas corpus ad subjiciendum*, on behalf of Kate Frances Monjo, of the city of New York, to obtain possession of her three children, alleged to be in the custody of the respondent, in the district of Montreal, the father, Domingo M. Monjo, appeared and presented a motion that the petitioner, being a non-resident, be held to give security for costs.

The Court said it was not the practice to allow costs in matters of *habeas corpus*, and the application for security of costs would not be granted.

Motion rejected without costs.

Trudel, Charbonneau & Lamothe for Intervenant.

Kerr, Carter & Goldstein for Petitioner.

APPEAL REGISTER—MONTREAL.

March 18.

Whitfield & Merchants' Bank of Canada.—Heard on motion for appeal to Privy Council.

Picard & British America Assurance Co.—Heard on motion for leave to appeal from interlocutory judgment.

French & McGee, & Rogers, ex qual.—Petition to take up instance granted.

Ex parte Kate Frances Monjo, Petitioner for *habeas corpus*. Petition for *habeas corpus* returned, and proceedings continued to 26th inst.

The Quebec Central R.R. Co. & The Ontario Car Co.—Heard on petition to have case heard by privilege.

Pillow et al. & Recorder's Court.—Heard on motion for leave to appeal to Privy Council.

Rolland & Cassidy.—Motion for substitution granted.

Roy & G.T.R. Co.—Part heard on merits.

March 17.

The Quebec Central R. Co. & Ontario Car Co.—Motion for privilege rejected.

Bowen et al. & Ontario Car Co.—Same judgment.

Whitehead v. Kieffer.—Motion for rule against prothonotary granted.

Roy & G.T.R. Co.—On merits; hearing concluded.—C.A.V.

Darling & Ryan.—Heard on merits; C.A.V.

Starnes & Molson, & E Contra.—Part heard on merits.

March 18.

Duval & Prieur.—Motion to unite causes granted.

Elie & Prieur.—Same judgment.

Leroux & Prieur.—Same judgment.

Senécal & Hibbard.—Motion for distraction granted by consent as of 9th Dec., 1884.

Starnes & Molson, & E Contra.—Hearing concluded.—C.A.V.

Western Assurance Co. & Scanlan.—Heard on merits; C.A.V.

Paradis & Molsons Bank & Compagnie d'Assurance Mutuelle de Joliette.—Heard on merits *ex parte*; C.A.V.

March 19.

Whitehead & Kieffer.—Rule returned.

The Queen & Provost.—Conviction maintained.

Berard Lepine & Corporation de Berthier.—Heard on merits; C.A.V.

Pinsonault & Molleur.—Heard on merits C.A.V.

Molleur & Pinsonault.—Do.

March 20.

Bougie & Symons.—Heard on merits, C.A.V.

Corporation de Berthier & Guevreumont.—Heard on merits; C.A.V.

Sundberg & Wilder.—Heard on merits; C.A.V.

March 21.

Wadsworth & McCord.—Three motions, rayé.

Whitfield & Merchants Bank of Canada.—Motion for appeal to Privy Council rejected.

Pillow et al. & City of Montreal.—Motion for appeal to Privy Council rejected.

Picard & British America Assurance Co.—Motion for appeal from interlocutory judgment rejected.

La Société de Construction d'Hochelaga & La Société de Construction Métropolitaine & Gauthier.—Confirmed.

St. Lawrence Sugar Refining Co. & Campbell.—Reversed.

Goldring & La Banque d'Hochelaga.—Reversed.

Thibaudeau & Mills.—Confirmed.

Curé et al. de Varennes & Choquet.—Reversed; Dorion, C.J., and Cross, J., diss.

Raymond Lajeunesse & Latraverse.—Reversed; judgment for \$2,800, with interest at 5 per cent., from service of summons.

Salvas & Brien Durocher.—Judgment reformed *quoad* imprisonment.

Credit Foncier & Thornton.—Appeal dismissed.

March 23.

Whitehead & White.—Motion for dismissal of appeal taken *de plano*, granted. Motion of appellant for leave to appeal as from interlocutory judgment, granted.

Wheeler & Black.—Motion for dismissal of appeal granted as to costs only, the factum of appellant being filed.

The Queen & Exchange Bank.—(Two cases)—Heard on merits; C.A.V.

March 24.

Bury & Samuels.—Reversed. Ramsay and Baby, JJ., diss.

Wylie & City of Montreal.—Confirmed. Monk and Cross, JJ., diss.

Les Commissaires d'Ecole & Les Soeurs de la Congregation.—Confirmed. Tessier, J., diss.

Les Soeurs de l'Asile de Providence & Le Maire et al. de Terrebonne.—Reversed. Tessier and Cross, JJ., diss.

Robinson & McMillan.—Confirmed. Monk, J., diss.

The Montreal, Portland, & Boston Ry. Co. & Hutton.—Judgment reformed *quoad* penalty; costs against appellant.

Guilbault & McConville.—Confirmed.

Whitehead & Kieffer.—Motion for delay granted.

Wadsworth & McCord.—Part heard on merits.

March 26.

Fulton & Creighton.—Motion for leave to appeal from interlocutory judgment rejected.

Gillespie & Stephens.—Motion for leave to appeal, granted.

Hutchinson & Ingram.—Motion to dismiss appeal granted for costs only.

Copeland & Leclaire.—Heard on motion for leave to print part only of the evidence; C.A.V.

Wadsworth & McCord.—Hearing concluded; C.A.V.

Grand Trunk & Meegan.—Heard on merits; C.A.V.

Ex parte Kate Frances Monjo.—Part heard on petition for *habeas corpus ad subjiciendum*.

March 27.

Vallières & Ryan.—Judgment confirmed, Baby, J., dissenting.

Reilly et al. & Hannan et al.—Judgment confirmed, Ramsay, J., dissenting.

Paradis & Molsons Bank, & Cie. d'Assurance Mutuelle de Joliette.—Reversed.

Almour & Henderson; Bouchard & Lajoie; Société de Construction & Galt; McVeigh & Millar; Mousseau & Fraser Institute; Perimées.—Appeals dismissed.

Ex parte Monjo.—Argument on petition concluded; ordered that the two sons remain in the possession of the father and that the little girl be placed in that of the mother, petitioner.

Copeland & Leclaire.—Motion rejected.

The Court adjourned to April 2 for judgments.

RECENT U. S. DECISIONS.

Guarantee Insurance.—Where an employer discovers a shortage in the accounts of his agent, it is his duty to notify the sureties of the agent of such shortage; and if he fails to

do so and continues to entrust business to the agent, the sureties are not liable for any money collected by the agent after the discovery. The sureties are discharged, however, only from the time such discovery is made by the employer, and not from the time he might with due diligence have discovered the shortage. The employer is not bound to use diligence to make the discovery, but must report it as soon as made.—*Connecticut Mutual Life Ins. Co. v. Scott et al.*; (Supreme Court of Kentucky, January, 1884).

Letters—Mailing—Presumptions.—The fact of mailing a letter properly addressed, with postage prepaid, creates no legal presumption that it was duly received, but it is merely a fact, which is to be weighed, along with other evidence, in determining the question, and to which no more presumption attaches than to any other fact.—*Sullivan v. Kuykendall*; Kentucky Court of Appeals.—17 Chicago Leg. News, 218.

Telegraph Company—Conditions.—The printed blank forms in common use by a telegraph company contained the following condition: "No claim for damages shall be valid unless presented in writing within thirty days after sending the message": and beneath the blank space for message and place of signature was printed in large type: "Read the notice and agreement at the top." Held, that one who filled up, and signed, a message upon such blank form was presumed to have had notice of such condition, and was bound by it as a part of the contract with the company. Held also, that the same was a reasonable stipulation, and not contrary to public policy.—(*Cole v. West Union Tel. Co.*) Sup. Ct., Minn.; N. W. Rep., Feb. 28.

GENERAL NOTES.

"George Eliot" relates the following characteristic anecdote of Carlyle:—"Carlyle was very angry with Emerson for not believing in a devil, and to convert him took him amongst all the horrors of London—the gin-shops, etc.—and finally to the House of Commons, plying him at every turn with the question, 'Do you believe in a devil now?'"

The Paris correspondent of the *Daily News* says that at the Bourges Assizes, a youth, aged 13, named Wentzels, apprentice to a confectioner, was tried for murdering his master. The prisoner cynically admitted that the idea of the murder had suggested itself to his

mind while reading Emile Richebourg's novel, "*La Belle Julie*," from which he gathered that nothing more could be done to an assassin under 14 than to confine him in a House of Correction till 21. His calculation was correct. On a verdict of guilty being rendered, the judges were bound by the Code to make an order to that effect.

The Supreme Court of Michigan in the case of *Bacon v. R. R. Co.* (21 N. W. Rep. 324) decided that an action can be maintained against a corporation for libel; and that where a corporation, by its superintendent, prepares and sends a "discharge list," assigning a criminal act as a reason for the discharge of an employee, to its agents, and it reaches its destination and is read by such agents, this is sufficient publication to support an action for libel. The question whether such a communication should be considered as privileged was not raised in the trial court, and was, therefore, not passed upon in the decision.

In *Swinburn v. Ainslie*, in the Chancery Division of the English Court (33 Weekly Reporter, 195) severance of trees from land by the wind was under consideration. Testator made his will in October, 1873, devising his real property. In December and January following, violent storms blew down a large number of trees on the property, and in February testator died without having taken any steps in regard to them. Held, that those which were substantially blown down had become personalty. In applying the test as to what should be deemed severed, Pearson, J., said: "A tree is substantially blown down if the tree is so far blown down that the tree cannot grow as a tree any longer in the ordinary sense in which a tree grows. A tree which is blown down within three feet of the ground cannot grow as a tree ordinarily grows, because a great number of the roots must be out of the ground. A tree that is simply lifted, and is no longer in the perpendicular, can grow as a tree."

In connection with the recent decision of our Supreme Court holding Franklin Pierce to be guilty of manslaughter in causing the death of a patient by gross and wilful negligence although there was no evil intent, a recent German case is of interest. A physician was held liable for negligence under these circumstances: A servant, who received a wound in the chest in April last, died from *septicemia* under the care of this doctor, who, despising antiseptic dressings, treated his patient according to ancient usages. The Court held that every medical practitioner should keep himself informed on the accomplished progress of science, and have an exact knowledge of modern systems of treatment. If these had been employed the patient's life might have been saved. Hence the liability for negligence. The Court of Appeals sustained the judgment.—*Boston Law Record*.

"George Eliot" went to the Tichborne trial, and gives her impressions in a letter to a friend:—"We have been to hear Coleridge addressing the jury on the Tichborne trial—a very interesting occasion to me. He is a marvellous speaker among Englishmen; has an exquisitely melodious voice, perfect gesture, and a power of keeping the thread of his syntax to the end of his sentence, which makes him delightful to follow. The digest of the evidence which Coleridge gives is one of the best illustrations of the value or valuelessness of testimony that could be given."

The Legal News.

VOL. VIII. APRIL 4, 1885. No. 14.

The case of *In re De Souza* has attracted some attention in Ontario. Mr. De Souza, who is an English barrister, claimed the right to practice before the Courts of Ontario without the intervention of the Law Society. The case came before the Common Pleas Division, which held that an English barrister, as such, is not entitled to practice in the Courts of Ontario unless admitted through the Law Society of the Province.

A telegram in the *N. Y. Herald* mentions a case before the English courts which will be of some interest. A jury had found a cabman guilty of receiving a half-sovereign at night, supposing it to be a shilling, but afterwards, when its real value was known, he retained it. The passenger carried also supposed it to be a shilling. At the trial the Court reserved the point of larceny. There being a difference of opinion between the judges as to whether the act constituted larceny, the question was ordered to be argued before the full bench.

Judge Bleckley, of the Georgia Bar Association, in a report on the subject of judicial reform, complains of the lagging administration of the law. "How is it," he asks, "with practical remedial jurisprudence? Is it up with, or is it behind the age? Compare it with other business, public or private; with operations of the war department, the navy, the treasury, the post-office, the interior; with commerce, manufactures, banking, transportation, mining, farming; with the venerable and conservative vocations of teaching and preaching; with any thing, and what is its relative position? The main bulk of world-work is ahead of it; several branches of that work, for instance, the postal service, general transportation, commerce and manufactures, are so far in advance that the law seems to crawl whilst they go on wings. Is this relative backwardness a necessary condition, rooted in the

nature of things, or is it attributable to deficient energy and enterprise on the part of the legal profession? Can it be possible the law is to become obsolete; that the ages are to outgrow it; and that though sufficing for the past, it is not equal to the demands of the future? Will it be Bradstreeted as a failure? Surely this supposition cannot be entertained. And if not, the conclusion is imminent that either directly or indirectly, we lawyers are responsible for the wide chasm that separates the effective administration of the law from those industries, public and private, with which it ought to be abreast. Is it fit that a body of men so numerous, so cultivated, so capable, should suffer their quota of labour, their distinctive calling, to remain hopelessly behind? Let a noble, manly pride answer in the negative." Mr. Bleckley's suggestions, however, like those of a good many other reformers, do not contain much that impresses itself as a real improvement.

THE LAW OF LIBEL.

In charging the jury in the case of *Reg. v. Tassé* (*ante*, p. 98), Mr. Justice Ramsay observed:—

GENTLEMEN OF THE JURY,—This case is one of some difficulty. At all times cases of libel were surrounded with difficulty. In ordinary criminal cases we deal with the theft of a man's watch or his purse, but in libel the question is as to a man's reputation, and this investigation demands more attention and care. I shall therefore endeavor to make the object of your enquiry as clear as possible, and in so doing I shall at once refer to something that was told you at the opening of the trial. The learned gentleman, who is complainant in this case, said that your verdict would have the effect of justifying his conduct or of condemning him; that the object of the trial was to obtain this justification or condemnation. This is not absolutely correct. It is perfectly true that a verdict of "not guilty" would be a declaration on your part that all that had been said was strictly true, and that the publication was for the benefit of the public; but a verdict of "guilty" would not necessarily be a justification. I don't say this to influence

your verdict, for with the results of your verdict you have nothing to do, but in order to explain to you that the real issue is as to whether Mr. Tassé has committed an offence or not.

At common law, a libel consists of any writing by which a man defames his neighbour, unless it be by what is known as a privileged communication. The privilege does not consist in saying what is true, but one is privileged in saying what it is one's duty to say, or what it is one's interest to say for one's own protection. If, however, the utterance was to gratify what the law distinguishes as "express malice" the privilege disappears. This appears to me to be very wise law; but the number of communications thus privileged was very limited, and as popular institutions developed, and all matters were more unreservedly discussed, it was felt that the limit of privilege was too restricted for many practical purposes. In the 6th and 7th Vic. a statute was introduced into the Imperial parliament, and passed there, for the purpose of giving greater liberty to literary critics. It is true this Act was introduced under the auspices of a distinguished judge, nevertheless I think the alteration in the law was unfortunate. In the course of this trial you may have heard me say that it was deplorable. This is perhaps a strong expression; but I do not hesitate to say that when an important alteration is being made in the common law, it should be made on principles that are in accordance with those of the common law, and that there is great cause for regret when this is overlooked. At any rate, when it was attempted to introduce the new English law into Canada, it was resisted, it is said, by no less a person than the late Sir Louis Lafontaine, and it was adopted for Upper but not for Lower Canada. The law of libel, therefore, remained in this province, as it stood at the time of the Quebec Act, which introduced the criminal law of England, as it then existed, into the Province of Quebec, until 1874. Then, after a trial in this court, attention was drawn to the difference existing in this respect between the law of this province and that of the other provinces, and a change was demanded, almost with clamor. This

change took place, and is now our law, and we must be governed by it, just as we had to be governed by the old law, no matter what people might think fit to say. In order to apply the new law properly, let us see to what the change amounts. The other day, in an argument which took place in your presence, Mr. Mercier described it as not being a fundamental change in the law of libel, but as being a new defence given to the person accused of libel. This is a very correct way of putting it so far, and I readily adopt it. However, it is to be observed, that it differs materially from any defence that existed before. As the law now stands the accused may plead, specially, that what he wrote was true and that it was published (not that he published it) for the benefit of the public. These two things concurring, he is absolved. It will be at once seen that under this plea no account is taken of malice. It matters not whether the defendant was moved by the direct malice or by the best motives. Truth and the public benefit are the tests of innocence or guilt. We have then three points to examine—1st, the truth of the matter alleged; 2nd, the question of whether the publication was for the public benefit; and 3rd, if you think the "defendant" guilty, whether he published the injurious matter knowing it to be false. If you think him guilty in manner and form as is laid in the indictment, you will say so simply; but if not, you can return a verdict of guilty of libel, but without knowing it to be false.

The libel is in these words (*translation*):—
"We know what has happened since Mr. Mercier contested the election of Mr. Mousseau, of the very man he had contributed to elect. Being unable to seize upon a portfolio, he then sold himself for \$5,000. Has there ever been a more revolting suit?"

Mr. Geoffrion has told you that the libel must be taken as a whole, and that words that are not libellous by themselves may become libellous by the context. This is correct; and as to the truth of the libel I must add that the whole injurious matter must be true. It is not sufficient that there should be some truth in it, and so the false be covered by the true,—the whole thing

must be substantially true. Now, what do the words complained of import—that Mr. Mercier had contributed to the election of Mr. Mousseau; that he had tried to snatch a portfolio; and, the most serious charge of all, that failing to do this he sold himself for \$5,000. We need not deal with the last words, for it will at once be conceded that if he did all this, the expression would be justified.

As to the first point, the evidence chiefly establishes a negative support of Mr. Mousseau. Mr. Mercier tells us that he preferred Mr. Mousseau as a candidate to Mr. Descaries, and that he and the other party leaders agreed not to interfere in the election. They were to leave their supporters free to vote for whom they liked, as both candidates were of the same party. This was already some assistance to Mr. Mousseau; but the evidence establishes something more than this. Several members of the liberal party took an active part in the election. One of them, a Mr. Aurelie Cauchon, now dead, obtained a letter from Mr. Laflamme, another of the liberal leaders, recommending Mr. Mousseau to the electors of Jacques Cartier in preference to the other candidate, Mr. Descaries. Mr. Cauchon took that letter to Mr. Mercier and asked him to sign it. Mr. Mercier declined. Cauchon then told him, he was being abused for the part he was taking in the election, and asked him to give him a certificate of honesty and respectability. This Mr. Mercier, unwillingly, did. To this man, armed with Mr. Laflamme's letter, he gave a special certificate, knowing it was to be used, and on purpose that it should be used, in furthering Mr. Mousseau's election. It can hardly then be said that it was not true that Mr. Mercier had contributed (for that is the mild word used) to the election of Mr. Mousseau. The next part of the charge is not supported as fully. It would be an exaggeration to say that there was no evidence about a portfolio; but it would be a total exaggeration to say that there was any evidence that Mr. Mercier had done anything improper in the negotiations referred to. It seems that in 1882 a proposition was made to Mr. Mercier by Mr. Senecal, whose influence or position is not proved in any way, that there

should be a coalition. Mr. Mercier did not absolutely reject this proposition, and meeting Mr. Dansereau some time later, he asked him if it meant anything? This led to further negotiations, and a meeting took place at Quebec, in the house of Mr. Descazes, Mr. Mercier's brother-in-law, where certain propositions were drawn up, to be submitted to both parties. It seems that Mr. Mercier demanded that three seats in the cabinet should be reserved for him and his friends. The conservatives would not consent to this, and the negotiation was broken off. It may perhaps be said that in seeking to go into the ministry, Mr. Mercier tried to snatch a portfolio; but it is a pretty rough way of expressing it. Snatching or seizing a portfolio (*arracher un portefeuille*) is putting his conduct in an evil light. Perhaps if it stood alone it might hardly justify a condemnation for libel, and if the more serious part of the charge is fully justified, it may be a matter of consideration what weight to attach to it. But if the rest of the charge is not justified, it is an aggravation that his motive was to avenge himself for not getting a portfolio. Something was said during the trial about a presumption arising from the dates of the election and the negotiation; but this has not been insisted on at the argument, and I don't see exactly the necessary consequence of these facts.

The last part of the words complained of is the most important part of the charge. With regard to it there is no difficulty as to the evidence. We have almost the whole story before us by Mr. Mercier's own evidence. We have a frank admission of what he did, and we have his justification. Now what he tells us is that he did receive \$5,000, which, he says, he never denied. His evidence also establishes that he instituted an election petition against Mr. Mousseau to protect his political friends in other counties, in the name of one Belanger; that having succeeded in establishing sufficiently that corrupt practices had been resorted to in the election, Mr. Mousseau was willing to let the election be annulled if Mr. Mercier would abandon the personal charges against him. That Mr. Mercier agreed to this if his costs were paid, and if his friends consented to it. That in

order to allow this project to be carried out the proceedings were adjourned on the 4th of May, 1883, to the 5th; that he called a meeting of his friends on the evening of the 4th; that they agreed that he should do this, and said that he should exact "liberal" remuneration for his trouble, and he was also reminded by his friends, that he should get as much as he could out of the opposite party, in order to help their friends in their contestations in other counties, and in certain penal actions that had been instituted by members of the conservative party; but that no sum was named. Mr. Mercier says that the sum was not definitely settled until the next day. Nevertheless it appears, by Mr. David's evidence, that the sum of \$5,000 had been suggested by Mr. Dufresne, a brother-in-law of Mr. Mercier, either on the evening of the 3rd or the morning of the 4th, in presence of Mr. Mercier, and that it had been communicated to Mr. Dansereau that this sum would be required. From Mr. Dansereau we learn that so completely was it understood on the 4th that \$5,000 was the sum to be given, that this amount was paid to Mr. Forget on the 4th to be placed to the credit of Mr. Mercier, with the direction that he was not to have the money till he (Mr. Mercier) filed a declaration of his abandonment of the personal charges. This declaration was filed, and he then received from the hands of Mr. Benjamin Trudel \$5,000. The taxed costs under the judgment annulling the election could not have amounted to \$2,000, so that Mr. Mercier received over \$3,000 in addition to his costs. Mr. Mercier and his counsel say, that he was entitled to take anything he could get out of the other party, that it was fair warfare, and that the other party agreed to it. No court in the world would sanction such a doctrine. He had no right to exact anything for his benefit in abandoning these charges. The transaction was totally illicit, and so much is this the case that, if the contract had become the subject of a suit to recover the amount, it would have failed, because the consideration was unlawful. It has been said there was no ransom. Yes, gentlemen, there was a ransom, and it was the whole sum above the taxable costs. I do not say that it was the greatest of crimes,

but it cannot be defended, and to do Mr. Mercier justice he hardly contends now that it was lawful. He admits he was guilty of an imprudence and he says if there was a sale there was a purchaser. That may be; no one can pretend that either party was free from blame. Of course there must be a corresponding offence in a matter like that; whether the fault of both be equally great is another question. The real causes of these disorders are the election laws, which do not accord with the moral sense of the people. Public opinion derides them, and politicians, we are told, habitually lay schemes to avoid the results which, strictly speaking, should follow on their infraction. This is not to be wondered at; nor is it a new remark that ferocious laws, which prescribe unjust punishments, out of all measure to the offence they are intended to correct, defeat their own object. It is to be hoped that before long people will open their eyes to the fact that the protection of the popular vote is purchased too dear at the expense of laws which are in themselves unjust. If I had to begin my career to-day I should refuse to run the risk of taking part in politics while these laws exist, or if I did incur such risk it would be to try to destroy them.

If you arrive at the conclusion that all that Mr. Tassé wrote was substantially true, that is not enough. There is still the question: Was it for the public benefit that it should be published? This last is not altogether an easy question. On it I do not intend to give you any special charge. It is one of those questions directly within your province to decide. I have not hesitated to explain to you the evidence where it was complicated with legal matters, but this question—What publication is for the public benefit? is one you are as well, or, probably better, able to judge of than I am.

Now, if you find that the defendant is guilty, you will have to consider whether the defendant knew that what he wrote was untrue. If there is not evidence to satisfy you that defendant knew, at the time, that what he wrote was false, you will have to say so. If, on the contrary, you think he purposely said what was false, you will have to say,

"Guilty, in a manner and form, as it is laid in the indictment."

I had nearly omitted to mention two or three things which I have noted. In the first place, you will not now have to consider the subsequent articles in the *Minerve* that have been put in. There is really no question under the plea of "not guilty," for the words alleged to be libellous do not form a privileged communication at common law. And as the defence turns wholly on the special plea there is no question of malice, and, consequently, they are of no importance in this case.

Secondly. There is little use in discussing Mr. Mercier's declaration from his seat in the house. It does not differ much from what he has stated here, except as to the point of his having a client on the petition, which he clearly had not.

Thirdly. It is insisted that Mr. Mercier had offered to give back part of the money. This was not against him, and if it had been told it would have been in his favour.

Fourthly. The report in the *Star* of the 11th September can have no weight. It was produced to establish that Mr. Mercier had denied on that day that he had ever heard before of the payment of the \$5,000. In cross-examination the reporter said it only applied to the fact that the money had been paid by Mr. Benjamin Trudel. If so, the point is of no importance; but that is not what the "interviewer" said. Whether we take what he said or what he says he intended to say, the report is manifestly absurd, as has been said. Four or five days before, the receipt of the \$5,000 had been admitted by Mr. Mercier at the St. Laurent meeting, and it was of no importance by whom it was actually paid.

Fifthly. The distinction of Mr. Mercier acting as a lawyer is inadmissible. He cannot thus disavow his responsibility. The profession of the law is a restriction and not a latitude.

A juror asked whether the money was paid to Mr. Forget before or after Judge Torrance had suggested to Mr. Mercier to withdraw the personal charges.

Ramsay, J.—I did not speak to you about what Judge Torrance said, because it does not appear he contemplated anything but a

simple abandonment of the personal charges. What he said had therefore no significance in this prosecution. But as a fact the money was only deposited after the adjournment on the 4th, and consequently after Judge Torrance had made the remarks referred to.

The same juror then asked the court to explain what had been said as to the knowledge of the defendant of the truth of the charges.

Ramsay, J.—I will explain by the statute. The second section is in these words: "Whoever maliciously publishes any defamatory libel, *knowing the same to be false*, is guilty of a misdemeanour."

The third section omits the words, "Knowing the same to be false;" but otherwise is in the same words as section two. In fact the law distinguishes between a lie and a misstatement, and it makes the punishment of the one greater than that of the other.

The jury having found the defendant guilty of having published a libel, but that there was no evidence that he knew it to be false, the following sentence was pronounced (March 9):—

"The duty now devolves upon the court to pronounce sentence on the defendant. Apart from the disagreeable nature of this duty, the apportionment of punishment, where any discretion is left to the court, is the most unpleasant act the judge has to perform. It is the highest exercise of the great trust society has reposed in him. Fully sensible as I am at all times of this responsibility, I am particularly so in a case where party feeling is vehemently excited, and where party interests are deeply involved. It is proper, therefore, that I should state summarily the considerations which motive the sentence I am about to pronounce. The accusation was that of publishing a defamatory libel, knowing the same to be false. The verdict was to some extent special, the jury finding that the defendant was guilty of having published a libel, but that there was no evidence that he knew it to be false. This amounts to a finding of "guilty" of the minor offence set forth in the second section of the "act respecting the crime of libel." This finding is within the instructions in law, which the court gave

them; instructions which conform perfectly to the ruling of the court (on objections raised by the defendant) on the morning of the 4th instant. Furthermore, this verdict was rendered in the exercise of the unquestionable functions of the jury, and it is not of a kind which demands any special comment on my part. The jury has found the defendant guilty of libel, but the statute has left to the court the power to measure, to some extent, its gravity by leaving a wide discretion in awarding punishment. Having left this discretion to the court, the legislature thereby imposed the duty of exercising it. In this case the fact on which the most serious part of the accusation was founded has not only been proved but it has been admitted and gloried in. That fact is that the complainant having the control of an election petition containing personal charges against Mr. Mousseau, the premier minister of this province, had abandoned those charges, and that the condition of this abandonment was the payment of a sum of money in guise of costs. This was an illicit consideration which evidently diminishes the gravity of Mr. Tassé's offence and induces me to limit the punishment to a fine, and to a fine of a moderate amount.

"The sentence of the court is that the defendant do pay a fine of fifty dollars, to be applied as the law directs, and that he be imprisoned till such fine be paid. The costs will follow the judgment."

NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, March 2, 1885.

Before TASCHEREAU, J.

DAME ANN SHAW LOW V. DAME ANN BAIN, and PHILLIPS *et al.*, Opposants, and PLAINTIFF contesting.

Procedure—Inscription.

The opposants filed an opposition *afin d'annuler* to the seizure and sale of certain immovable property taken in execution by plaintiff on a judgment against defendants.

On the 26th February the plaintiff contested this opposition by an answer in law, and inscribed for hearing on the law issue on the

2nd March. On the 28th February she gave notice of motion for the 2nd March to dismiss the opposition. The opposants then served notice of motion to reject the inscription on the demurrer as prematurely filed. The two notices and the demurrer came up for argument together.

On the motion to reject the opposition the Court held that the notice came too late, being made after contestation of the opposition.

On the motion to reject the inscription as premature it was held by the learned judge after consultation with some of his colleagues, that the inscription was premature. That though the party whose pleading was demurred to might inscribe at once if he chose, yet he had a right to a delay of eight days to answer, and the party demurring could not inscribe before the expiration of the delay. (Rule of Practice 52, and C. C. P. 137, 138, 139 and 148).

Motion granted and inscription rejected.

MacLaren, Leet, Smith & Rogers for plaintiff.

Robertson, Ritchie, Fleet & Falconer for opposant.

COUR DE CIRCUIT (EN APPEL).

MONTREAL, 10 mars 1885.

Coram CARON, J.

VIAU *et al.*, Appelants et LA CORPORATION DE LA PAROISSE DE ST-FRANÇOIS D'ASSISE DE LA LONGUE-POINTE et LE CONSEIL DU COMTÉ D'HOCHELAGA, Intimés.

Conseil de comté—Procès-verbal—Appel à la cour de circuit—Juridiction.

JUGE: 1o. *Qu'on ne peut se pourvoir par voie d'appel, devant la cour de circuit, suivant les dispositions des articles 1061 et suiv. du Code Municipal, de la décision d'un conseil de comté, relative à un procès-verbal adopté par un conseil local et homologué par ce conseil de comté siégeant en appel.*

2o. *Que même en opposant, qu'en pareil cas, le défaut de juridiction de la cour de circuit ne serait pas invoqué, cette cour devrait renvoyer les parties, vu son défaut absolu de compétence.*

3o. *Que sur appel de la décision relative au procès-verbal en question, les intimés requérant ce procès-verbal sont intéressés à son main-*

lien ; et qu'aux termes de l'art. 1067 du Code Municipal, ils devaient être mis en cause et copie du bref d'appel devait leur être signifiée ou à leur procureur.

40. Que lorsque le conseil de comté est assigné, comme en la présente cause, il a le droit d'ester en justice tant pour se défendre que pour soutenir la décision qu'il a rendue.

Les appelants se sont pourvus, par voie d'appel, devant la cour de circuit, d'après les dispositions des articles 1061 et suiv. du Code Municipal, d'une décision du conseil du comté d'Hochelaga. Cette décision était relative à un procès-verbal fait et homologué par le conseil local de la paroisse de la Longue Pointe, et cette homologation fut ratifiée et confirmée par le conseil du comté d'Hochelaga, siégeant en appel.

Le conseil du comté d'Hochelaga, sans soulever aucune question relative au mérite de ce procès-verbal, a répondu au bref d'appel et en a demandé l'annulation par simple motion dont voici les principales allégations :

10. Que dans l'espèce, il s'agit de la décision d'un conseil de comté siégeant en appel d'une sentence prononcée par un conseil local, au sujet d'un procès-verbal.

20. Que les seuls intimés, c'est-à-dire les requérants et intéressés au maintien du procès-verbal, n'ont pas été mis en cause.

30. Que les intimés dénommés au bref d'appel, ne sont pas en réalité de véritables intimés, mais simplement un tribunal spécial, établi par le Code Municipal, pour décider les questions de la nature de celles dont il s'agit.

40. Que le conseil de comté n'est pas un être moral pouvant être assigné, mais n'est que le mandataire de la corporation du comté d'Hochelaga, qui seule pouvait, en sa qualité de corps politique et incorporé, ester en jugement en la présente cause.

Le conseil du comté d'Hochelaga, l'un des intimés, a cité au soutien de ses prétentions, les articles 73, 95, 1061, 1067 du Code Municipal et l'art. 114 du C. P. C. Il a de plus invoqué la décision rendue par l'hon. juge Loranger dans la cause de *La corporation de la paroisse de la Pointe-aux-Trembles*, appelante, et *La corporation du comté d'Hochelaga*, intimée, rapportée au 7 L. N. 158. Et la cour

s'appuyant sur les autorités ci-dessus, a accordé la motion du conseil du comté d'Hochelaga et cassé et annulé le dit bref d'appel.

Loranger & Beaudin, pour les appelants.

Préfontaine & Lafontaine, pour la corporation de la Longue Pointe.

Prévost & Bastien, pour le conseil du comté d'Hochelaga.

(J. G. D.)

TRIBUNAL DE COMMERCE DE LA SEINE.

PARIS, janvier 1885.

PUCHEN V. LA COMPAGNIE DU NORD.

Chemin de fer—Chien perdu pendant le transbordement d'un wagon à un autre—Responsabilité de la Compagnie.

JUGE:—*Qu'une Compagnie de chemin de fer est responsable de la valeur d'un animal qui lui est confié pour être transporté d'un endroit à un autre, lorsqu'il brise le lien qui le retient et s'échappe.*

M. Puchen avait confié à la Compagnie du Nord un chien griffon pour être expédié par grande vitesse, à l'adresse de Mme veuve Fourrier, à Guillaucourt, en gare. A la bifurcation de la voie, au moment où le chien était transbordé dans un autre wagon, il brisa sa laisse et s'est sauvé. Il n'a pu être retrouvé. M. Puchen avait assigné la Compagnie du Nord devant le tribunal de commerce de la Seine, en paiement de 500 francs, valeur du griffon.

La compagnie du chemin de fer, pour résister à cette demande, soutenait qu'elle n'avait commis aucune faute, et que si le chien confié à ses soins s'est sauvé, elle ne saurait être responsable de cette fuite, puisque la laisse du chien était en mauvais état, et qu'il est en outre stipulé à l'article des tarifs généraux que lorsque les chiens voyagent sans être accompagnés, le chargement et le déchargement de ces animaux sont opérés par les soins et aux risques et périls de l'expéditeur et du destinataire.

Le tribunal a déclaré dans son jugement que l'article 23 ne s'appliquait qu'aux gares de départ et d'arrivée, et que la responsabilité de la Compagnie pour les agissements de ses

employés en cours de route n'était nullement dérangée par l'article précité; et que dans l'espèce le chien avait été égaré dans le transbordement d'un wagon à un autre; que la Compagnie n'avait pas fait la preuve du mauvais état de la laisse et au surplus qu'il lui appartenait de l'examiner au départ et de prendre les précautions nécessaires.

La valeur du chien ayant été estimée trois cents francs, la Compagnie du Nord a été condamnée au paiement de cette somme et aux dépens.—(*Du JOURNAL DE PARIS, rapport de Maître Louis Albert.*)

(J. J. B.)

LIBEL SUITS AGAINST NEWSPAPERS.

Mr. Labouchère having triumphantly put his latest assailant in a libel suit under his feet, naturally enough falls to criticising the libel laws of England. He shows successfully not only that he ought to have been acquitted as he was acquitted of libelling Lambri, but that he ought never to have been subjected to the annoyance and expense of defending himself against Lambri, since it was perfectly clear that in stating the truth about Lambri as he stated it he was rendering the community an important service. Mr. Labouchère's point strikes directly at a mischievous notion to which American judges cling as if it were a necessity of social existence. Mr. Labouchère says that the English law recognizes no distinction as between the publication in good faith or in bad faith of a false statement, and that the English law allows a jury to mulct a journalist or a private letter-writer in discretionary damages, no matter whether such journalist or such writer wrote in good or in bad faith. In other words the law assumes that every false statement must be a malicious statement, and equally malicious whether made with good or with bad intent. Fresh from a thorough exposition of the law of libel made by eminent Queen's counsel and a Lord Chief Justice, Mr. Labouchère thus puts his case: "Surely criminal law should make a distinction between good faith and bad faith in regard to published matter. In the former case there can be no moral criminality, and nothing is more obnoxious to justice than to

make a legal distinction between what is morally and what is legally criminal. Supposing that a person was to poison an entire family in South America, and having been tried and condemned to death for the crime, were to escape and come over to England. Were I to know of his having become an inmate of an English family and that he had with him a carefully assorted selection of potent poisons, I might be criminally prosecuted were I to warn the family by letter. And at the trial it would not suffice for me to prove that he had been condemned to death for murder in South America, but I should have to prove that he actually did murder, otherwise I should be liable to fine and imprisonment." We doubt if any judge would commit for contempt a juror who should determine for himself that in no circumstances would he ever convict or mulct a writer who could be proved to have written in good faith and without malice what he had reason to believe to be true. In this city not long ago a journal was mulcted in \$1,500 damages for making a statement which was admitted to be true as to a person named we will say Smith, and innocently applying the statement to another person named Smith, living in immediate proximity with the first Smith, though the second Smith was not shown to have been injured by the misapplication. Moreover, the appellate judges upheld the damages and laid down the doctrine that the law should make no difference between good or bad faith in such a matter.—*N. Y. World.*

GENERAL NOTES.

The Act passed last month by the Legislative Assembly of British Columbia, "to prevent the Immigration of Chinese," has been disallowed by the Dominion Government.

The sudden death of Earl Cairns was reported by cable, April 2. Deceased was born in 1819; called to the bar in 1844; appointed one of Her Majesty's counsel in 1856; solicitor-general in 1858, and attorney-general in 1866. The same year he succeeded Lord Justice Knight Bruce in the Court of Appeal. In February, 1868, he became Lord Chancellor in Mr. Disraeli's Ministry, but left office in December of that year on the resignation of the Government. He became Lord Chancellor a second time in 1874, and held office until 1880.

The Legal News.

VOL. VIII. APRIL 11, 1885. No. 15.

The Term of the Court of Queen's Bench, Crown Side, which has just terminated, presented a series of cases of peculiar interest, and not least the embracery case of *Reg. v. Leblanc*, reported in the present issue. As the law reporter does not usually follow the judge holding the criminal terms into this division of the Court, and as there has recently been special and well-founded complaint against popular reports of the proceedings, it may be useful to state that the text of the reports in the *Legal News* has had the approval and *imprimatur* of the learned judge presiding. As far as we recollect, all the reports of criminal cases which have appeared in the *Legal News* since the beginning of the work have been similarly approved. By text we mean the body of the report, exclusive of the head notes.

The *Montreal Law Reports* for April, in addition to the instalment of the Queen's Bench series issued some time ago, comprise pages 145 to 192 of the Superior Court series. Sixteen cases are reported, in which a number of new questions of interest are decided. The issues for the four months to date of the current year make a total of 416 pages of the work, including decisions on almost every branch of the law.

We were not aware that the colony of Canadian lawyers in New York was especially large. As far as this section of Canada is concerned, the *émigrés* whom we can call to mind were gentlemen whose continued presence here would have proved rather embarrassing to themselves, and have subjected them to possibly prolonged deprivation of liberty. These are hardly to be considered fair specimens of the profession in Canada; their success or failure abroad does not prove much one way or the other, nor are they comfortable associates for those who may legitimately seek to try their fortune in a larger field. We presume that there must

be some of the latter, for a writer in a contemporary says:—"Many Canadians are prone to think that to locate in New York means assured success. Let not the young men of Canada deceive themselves; they will find at the bar of that State many hard-working, energetic, capable lawyers, men who devote their time both early and late to the continuous and well-directed prosecution of their profession, so many in fact, and so well directed their efforts, that the competition there is most intense."

A law in force in Illinois apparently compels judges to grant a change of venue, upon application supported by affidavit charging the judges themselves with "prejudice." A judge writing to the *Chicago Legal News* exclaims indignantly against the toleration of such a practice. He says in thirty years' experience he has never known a single meritorious petition against the judge. "The law permits the judge to be outraged and humiliated by any suitor, whether conscienceless, or ignorant, or possessed of the vulgar notion that because the judge holds a point of law adversely to him, he is therefore prejudiced, and peremptorily closes his mouth to his own vindication. The very man whom the law places in the judgment seat with the injunction to give judgment against no man, nor even to entertain a charge against him, without giving him an opportunity to be heard in his own vindication, and whose conspicuous station, lifelong habits of study and thought, and the desire to win the approval of his fellow men, all tend to inspire with a high sense of honor, is the *only* individual entering the courts of law who can be stained and defamed and bedaubed with impunity, and who can be driven away from that tribunal, so far as the particular case is concerned, by an *ex parte* affidavit mechanically copied from a book of practice, and which has been tested in the Supreme Court and found sufficient." He is surprised that such an iniquitous rule should be tamely submitted to, and encloses the following copy of an order on change of venue recently made by himself:—"This untrue petition seems to be correct in *form* and

technically sufficient, and while I know it to be untrue, yet so long as the people of this State deem it wise to permit the judges of their highest courts of general original jurisdiction to be humiliated and insulted by having such applications thrust in their faces by parties to suits whenever prompted by ignorance, passion, prejudice against the judge, or by a desire to harass or delay the opposite party, while at the same time the mouth of the judge is closed to the vindication of his honor and self-respect, the judge in any case can only submit to the humiliation and insult. I do accordingly order that the venue of this cause be changed," etc.

The *Albany Law Journal* in reply to a correspondent says: "We think that criticism of judicial decisions is one of the most important offices of a law journal. We do not think however that defeated attorneys ought to rush into print and criticise the courts in their own cases. They are not competent judges of the merits of their own cases. We have no 'dumb reverence' for our courts. If their decisions do not commend themselves to our judgment we never hesitate to say so."

According to the figures given by a Mr. Jones in an address quoted by a contemporary, the salaries of the judges in the neighbouring Union are as small as in Canada. He says: "Upon a careful tabulation of the statistics, I find that the sum of \$4,221 represents the average salary paid by the states of this Union to a chief justice of the Supreme Court or Court of Appeals—that the sum of \$4,100 is the average salary paid to associate justices of the Supreme Court or Court of Appeal; and that the average salary paid to circuit judges amounts to the sum of \$3,158."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

[Crown side.]

MONTREAL, March 26, 1885.

Before RAMSAY, J.

The QUEEN v. P. E. LEBLANC, on indictment for embracery.

Embracery—Proceeding pending.

It is essential to the existence of the offence of embracery that there should be a judicial proceeding pending at the time the offence is alleged to have been committed: and the existence of such proceeding must be alleged in the indictment.

A recognizance which on its face does not set out the particular offence charged against the person bailed, and which therefore on its face cannot be identified with any case, is insufficient to establish that a case is pending.

RAMSAY, J. This case was adjourned till to-day on a difficulty that arose as to the evidence, namely whether it was necessary in a case of embracery that there should be a proceeding pending. The definition of this offence is not absolutely clear, and so few cases have occurred in England that the authorities are very scarce. I have therefore had recourse to a work, which although not what we call authority, is a very able compilation. I refer to the Digest of the criminal law by Mr. Justice Stephen, in which I find this definition of the offence of embracery: "Every one commits the misdemeanor called embracery who by any means whatever, except the production of evidence and argument in open court, attempts to influence or instruct any jurymen, or to incline him to be more favourable to the one side than to the other in any judicial proceeding whether any verdict is given or not, and whether such verdict, if given, is true or false."

In a note the learned compiler modestly adds: "The crime is so rare that the definition is very imperfect and more or less conjectural."

It has been my principal business to enquire since the Court rose on Tuesday evening how far the conjecture was imperfect as regards this point. On referring to the 5th Report of the Commissioners on Criminal Law, art. 50, I find this definition "Whoever shall by any means whatsoever endeavour unduly and corruptly to influence any person impanelled, summoned, or expected to serve as a juror in any proceeding, in respect of his duty as such juror, shall incur" &c. Here then we find the necessity of the existence of a proceeding as a *sine qua non* to the existence of the offence. It may, however, be said that this report is a sug-

gestion, and not an authoritative statement of the law. That must be admitted; but when we come to look at the citation from Hawkins by which this article purports to be supported, there again we have "one side and the other" and "the trial of the cause," which certainly implies a pending proceeding. This too is consonant with every other portion of the law which I can recollect, and I can hardly think it will be seriously contended that persuading a juror generally of his duties, without reference to any case, implied or designated, would amount to embracery. There is no authority for saying so, and in a wholesome zeal to destroy this dangerous offence, we must be careful not to run the risk of confounding innocence and guilt.

A case of *Rex v. Opie*,* reported in 1 Saunders, 300 c., is relied on to show that the proceeding need not be pending, for that all was alleged to have taken place, on the 17th day of March in a certain year, that is to say, the suit, the plea and the trial.

The case, so far as it goes, seems to me to establish the reverse, for it is alleged that a case was pending, the names of the parties are given at length, the cause of action and the plea, and it was alleged that before trial, the offence was committed. It could not have been committed after trial, and therefore that was alleged. By the narrative it appears that the case must have continued to exist after the institution of the action, since the plea was filed, and the trial had on the 17th March.

It was also argued that a person under prosecution could challenge a Grand Juror

* In this case there is an attempt to attribute to Chief Justice Hale, an extraordinary dictum, namely that he would not hear a motion in arrest of judgment because of the scandalous nature of the charge. It may safely be presumed that this eminent judge never said anything so foolish, and that he has been made the victim of an accident not altogether unknown in the present day, an unfaithful report of what took place. Mr. Saunders, who was both counsel and reporter, does not tell us the grounds of his motion. Did we know them, we should be in a position to say what Hale declined to hear. It has long been a logical difficulty to say when a proposition is untenable; nevertheless, there are such things as untenable propositions even in law, and practice shows us that, if exceptional, they are not rare.

(Hawkins, Bk. 2, ch. 25, sect. 16), and that under our criminal procedure act (32 & 33 Vic., c. 29, s. 11) the court or judge could change the venue or place of trial "of any person charged with felony or misdemeanour, and therefore, by analogy, embracery could be committed in a case before indictment. These quotations only go to show that a person *under prosecution* may challenge a grand juror, and that a person *charged* may have the *venue* of his trial changed. It will be observed that Hawkins says: "Under prosecution" and that our statute says that there must be a person "charged." If, then, there is any argument to be drawn from these citations it is that there must be a *prosecution* or a *person charged*. I am therefore of opinion that there must be a judicial proceeding and by that I mean one that exists.

At this moment it is not necessary for me to go further, and I don't wish to forestall the questions that may be raised in this unfamiliar proceeding; but lest anything that fell from the Court on Tuesday evening may have been misunderstood, it is proper to state, that the magistrate has three modes of dealing with a complaint. He may commit, or he may bail or he may discharge. If he discharges, the proceeding is at an end. If he commits or bails, it is continued.

The prosecution thereupon proceeded to establish the complaint in the case of *Reg. v. Bulmer*, the appearance of the accused without warrant or summons, that he cross-examined the complainant, and his voluntary examination, without objection. The prosecution then offered to prove a recognizance by Henry Bulmer docketed: "Montreal, 12th day of August, 1884. The Queen against Henry Bulmer. Offence: misdemeanour. Recognizance of Henry Bulmer, defendant, to appear on the 1st September." In the body of the document the condition of the recognizance is thus set forth:—"The condition of the above written recognizance is such, that if the above bounden Henry Bulmer appear in person at the ensuing term of the Court of Queen's Bench holding criminal pleas, in and for the said district, to be holden at the Court House, in the said City of Montreal, on the first day of September, at ten o'clock

in the forenoon, and shall appear from day to day until he *be duly discharged*, then and there to answer such complaint, charge or charges as shall be on the part of Our Sovereign Lady the Queen, then and there preferred against him for misdemeanor, and shall keep the peace and be of good behaviour towards all Her Majesty's liege subjects and particularly towards Adolphe Davis until that time, then this recognizance shall be null and void, otherwise to remain in full force and virtue."

The production of this document was objected to on the part of the defence, that it was not a recognizance in any case, that it does not set out the charge or any offence whatever, and that it is not in accordance with the form, and does not give the substance of the form as required by section 52, 32 and 33 Vic., ch. 30.

On the part of the Crown it was contended that at common law it was a good recognizance, and that it formed part of the proceedings. Hawkins, Book II., ch. 16, p. 178, was quoted.

RAMSAY, J., said it was a good recognizance, but on its face it could not be identified with any case, or establish any continuation of the proceedings. Its being returned with a packet of papers established nothing, and, therefore, it was not evidence to go to the jury.

The prosecution then proved the complaint in the case of *Regina v. Tussel*, appearance, &c., as in the case of *Bulmer*, without objection; but when it was proposed to put in and prove the recognizance the defence again objected on the same grounds as in the *Bulmer* case.

RAMSAY, J. But there is a notable difference: the defendant is bailed to answer to a charge of libel, and libel is the offence in the indictment.

Mr. Pagnuelo, Q.C., for the Crown, said that the form in the statute intimated that the offence was to be stated "succinctly."

The Court admitted the recognizance *de bene esse*. It was considered as read.

The prosecution then proceeded with the Buntin case, and offered to prove the complaint.

Mr. St. Pierre, for the defence, objected to its production, as the indictment had set up that indictments were to be preferred.

RAMSAY, J. The indictment says more than this. It sets forth: "that among the criminal offences in due course so to be enquired into and presented by the said Grand Jury upon bills commonly called indictments to be preferred."

Mr. St. Pierre. Offences are not proceedings; and an indictment might be preferred although there was no existing proceeding.

Mr. Pagnuelo contended that the indictment was sufficient to give the accused to understand with what he was charged.

RAMSAY, J. It is not to be wondered at that a proceeding so new to us should give rise to embarrassment. The decision this morning maintained that a proceeding must exist, and it is a sequence of that decision that a proceeding should be alleged. Instead of that an offence is alleged, and the proceeding is to be preferred. If it were proved that the indictment had been preferred in these three cases the evidence would be at variance with the indictment in this case. Unless the prosecution can get over this difficulty I do not see the use of going on with the case.

Mr. Pagnuelo. Under the ruling of the Court I don't see what other evidence I could adduce that would be available.

RAMSAY, J., then charged the jury to acquit. At the suggestion of the Court the other accusations were abandoned, and verdicts of acquittal were entered up.

COUR DE CIRCUIT.

MONTREAL, 24 mars 1885.

Coram CARON, J.

NORMANDEAU V. LANGEVIN et vir.

Mandat—Prêt d'argent.

La défenderesse est séparée de biens d'avec Augustin Varet, son mari, et l'a autorisé d'effectuer pour elle un emprunt d'au moins \$1,500. Il s'adressa au demandeur, notaire et courtier, qui lui servit d'intermédiaire pour l'emprunt; mais au lieu de \$1,500 dont la défenderesse avait absolument besoin, on l'informa, que la somme empruntée n'était que de \$800. Elle refusa cette

somme, alléguant son insuffisance et refusa en même temps de souscrire l'acte d'obligation dressé à l'avance par le demandeur, en faveur du prêteur.

Jugé : 1o. Que la défenderesse n'était pas tenue d'accepter ladite somme de \$800, ni de souscrire l'acte d'obligation.

2o. Que le mandataire qui n'exécute que partiellement le mandat dont il s'est chargé, n'oblige pas le mandant et commet en même temps une faute grave, et qu'il est seul responsable envers ceux avec qui il a ainsi contracté.

Le demandeur réclamait de la défenderesse, la somme de \$30.50 pour commission sur l'emprunt en question, examen de titres, consultations, pas et démarches, rédaction d'acte d'obligation et hypothèque.

La défenderesse contesta cette demande alléguant, entre autres choses :

Qu'elle n'avait jamais requis les prétendus services du demandeur et n'avait non plus jamais autorisé qui que ce soit à requérir les dits services.

Que si l'emprunt en question avait été effectué par l'entremise du demandeur, cet emprunt n'était pas dans son intérêt, elle ne l'avait pas autorisé, le répudiait formellement et n'était aucunement responsable envers le demandeur.

Le demandeur prouva la valeur de ses services.

D'un autre côté, la preuve démontra que la défenderesse avait autorisé son mari à faire un emprunt d'au moins \$1,500, somme indispensable pour l'affaire qu'elle avait en vue et qu'une somme moindre ne pouvait, dans les circonstances, lui être d'aucune utilité.

A l'argument, elle soutint que l'exécution partielle du mandat avait été une faute grave de la part de son mandataire, qu'il ne l'avait pas obligée et qu'elle ne pouvait être tenue d'accepter un emprunt tout à fait insuffisant et d'aucune utilité pour elle. Et à l'appui de ses prétentions elle cita les autorités suivantes :

Troplong, Mandat, éd. belge, No. 268, p. 101. Le même, Nos. 302, 303, 328, 349, 350, 591, 592, 598. Pothier, Mandat, Nos. 87, 88, 89. C. N. 1997. C. L. 2981. C. C. B. C. 1717, 1727. 12 R. L. 377. Story, Agency, 264, 265.

La Cour prit la cause en délibéré et renvoya l'action du demandeur avec dépens.

Action renvoyée.

C. Lebeuf, pour le demandeur.

Augé & Lafortune, pour la défenderesse.

(J. G. D.)

SUPERIOR COURT—QUEBEC. *

Evidence—Payment of judgment—Execution—Collateral security.—*Held*, 1. That verbal evidence is not admissible to prove payment of a judgment exceeding \$50, though the judgment was for a debt of a commercial nature.

2. That a creditor who has obtained a joint and several condemnation against several debtors, may execute against one of them for the whole amount though he has received a note by way of collateral security from another defendant. — *Dominion Type Co. v. Pacaud et al.* (In Review.)

Vendeur — Rémeré — Bornage.—*Jugé* : Que le vendeur à rémeré, conserve un *jus in re* dans la chose vendue, et que le voisin peut le joindre à l'acheteur dans une demande en bornage.—*Lemieux v. Lemieux, et King.*

Damages caused by wrecked vessel.—The owner of the wreck of a steamer which obstructs the navigation of a river, is responsible for the damage caused to a vessel running thereupon, if a light be not kept at night, and proper marks by day, to indicate the position of the wreck.—*Baker v. Freeman.*

Pew in Church—Rights of lessee.—The lessee of a pew has an action in *factum* against a third person who interferes with his occupation of such pew. The right of the lessee is based on his lease which he should allege and prove.—In this case alterations had been made in a church, and some of the pews had been reconstructed. The defendant persisted in occupying a pew not corresponding to the one formerly leased to him, on the pretence that a board from his old pew had been employed in the construction of the pew which he wished to occupy. The Court said : " Le droit du locataire d'un banc d'église de poursuivre le tiers qui le trouble dans la possession de ce banc n'a jamais fait doute dans le

droit français, non plus que dans le nôtre."—*Champagne v. Goulet*. (In Review.)

Partnership—Dissolution—Account.—A partner who had the sole management of the partnership business, cannot, after the dissolution, sue the other for a balance until he has rendered an account, or unless he tenders an account with his action. If the account rendered has been accepted by the former co-partner and contains an error, the only action competent to either is an action in reformation of account.—*Blais v. Vallières*. (In Review.)

APPEAL REGISTER—MONTREAL.

April 2.

Campbell & Bate, and Cunard SS. Co.—Motion for leave to appeal from interlocutory judgment, rejected.

Hurteau & Laurence.—Confirmed, Ramsay and Baby, JJ., dissenting.

The Queen & Massue.—Two cases. Judgment reversed, Dorion, C. J., dissenting.

Lord et al. & Davison.—Judgment confirmed, Cross, J., dissenting.

Davison & Lord et al.—Appeal dismissed, Cross, J., dissenting.

Guilbault & McConville.—Motion for appeal to P. C., granted.

JURISPRUDENCE FRANÇAISE.

Servitude de passage—Titre—Interprétation—Destination du père de famille—Enclave—Caractères.

1o. La clause d'un acte de partage ainsi conçue: "Les dessertes, passages, irrigations et autres servitudes d'usage seront continuées dans les temps et les droits accoutumés," doit être considérée comme une clause de style et est trop générale pour constituer une servitude de passage en un lieu déterminé.

2o. Une servitude de passage discontinue mais apparente peut-elle être établie par la destination du père de famille?

(*Non résolu*.)

3o. Une simple incommodité ne peut suffire pour constituer l'état d'enclave.

(19 déc. 1884. *Cour d'Appel de Lyon*. *Gaz. Pal.* 17-18 fév. 1885.)

Diffamation—Carte Postale—Absence de publicité.

La diffamation ou l'injure contenues sur une carte postale envoyée par la poste, ne présentent pas le caractère de publicité exigé par la loi, lorsqu'il n'est pas établi que la carte postale dont il s'agit ait été lue ou vue par d'autres personnes que les employés des postes ou la concierge avant d'arriver aux mains du destinataire.

(4 déc. 1884. *Trib. Cor. de la Seine*. *Gaz. Pal.* 17-18 fév. 1885.)

Chemins de fer—Transport de marchandises—Tarif spécial—Cassure—Responsabilité.

Une compagnie de chemins de fer, exonérée par une clause du tarif spécial auquel voyage une marchandise, de toute responsabilité, quant aux déchets et aux avaries de route, ne l'est pas par cela même des cassures qui ne sont pas comprises dans ces énonciations.

(25 juil. 1884. *Trib. Com. de Nîmes*. *Gaz. Pal.* 17-18 fév. 1885.)

Immeuble par destination—Etablissement horticole—Plantes, arbrisseaux, fleurs, vases et pots—Objets nécessaires à l'exploitation.

Sont immeubles par destination les arbrisseaux, plantes et fleurs, vases et pots, placés sur un fonds par le propriétaire pour l'exploitation d'un établissement horticole et la reproduction et la culture des plantes et fleurs qui alimentaient son industrie.

(31 jan. 1884. *Trib. Civ. de Villefranche*. *Gaz. Pal.* 17-18 fév. 1885.)

Legs—Légataire universel—Mandat verbal par le de cujus au légataire de payer une somme—Demande d'enquête—Serment décisoire.

Tout legs verbal est radicalement nul; par suite les tribunaux ne peuvent ordonner une enquête sur une articulation de faits tendant à établir que le de cujus a donné à son légataire universel le mandat verbal de payer une certaine somme à une tierce personne.

La déclaration du serment décisoire est également, dans ce cas, inadmissible.

(8 déc. 1884. *Trib. Civ. de la Seine*. *Gaz. Pal.* 20 fév. 1885.)

Incendie — Responsabilité — Locaux occupés mais non habités par le propriétaire de la maison—Art. 1733 et 1734 C. Civ. — Présomption non applicable.

La présomption des art. 1733 et 1734 C. Civ. cesse d'être applicable quand l'immeuble incendié n'est pas occupé seulement par les locataires, mais aussi par le propriétaire, et il n'y a aucun motif de distinguer si le propriétaire habite ou n'habite pas les lieux dont il s'est réservé la jouissance exclusive et la libre possession.

La responsabilité qui dans l'un et l'autre cas lui est personnelle, prive le propriétaire du bénéfice résultant des art. 1733 et 1734 C. Civ., à moins qu'il ne soit prouvé que l'incendie n'a pas commencé dans les lieux habités par lui ou restés à sa disposition et demeurés sous sa surveillance.

(5 déc. 1884. Trib. Civ. de Lyon. Gaz. Pal. 24 fév. 1885.)

STANDARD TIME.

To the Editor of THE LEGAL NEWS :

SIR,—The difference of local time according to longitude having been found very inconvenient by the managers of railways in Canada and the United States, especially as to their time-tables, a conference of these gentlemen was held in 1883, at which it was decided to recommend for adoption a system of *standard time* by which railways should be run by it, each 15° of longitude (one hour in time) to form a time zone, within which all railways should be run by it, the time of the centre meridian of each zone being taken as the standard for the seven and a-half degrees on each side of it, and that of 75° of West Longitude from Greenwich being chosen as the standard to be used by railways within the territory bounded by the meridians of 67½° and 82½°, including the Atlantic States and a large part of Canada. The same rule was to be observed for the whole distance across our continent. This system was nominally adopted by a very large majority of the American and Canadian railways. But it was found difficult to abide by it in some cases in consequence of the sudden jump of an hour in time in passing from one time zone to another, as many railways in both

countries must do; and it seems the Grand Trunk, Great Western and Canadian Pacific are each run into two time zones within Ontario, and the Intercolonial into two such zones in Quebec, New Brunswick, and Nova Scotia. There must be many railways in the United States which violate the conference rule in like manner; and this is a very great imperfection in the rule itself. But this is a matter for the consideration of the railway magnates themselves. The matter to which I desire to call your attention is the legal aspect of the case.

Many people (not lawyers, of course) seem to suppose that standard time has become *legal time*, and seem inclined to govern themselves and their doings by it, thus putting the railway managers in the place of the Legislature. Now, looking for the moment at Ontario alone, standard time at London is about twenty-four minutes earlier than legal time; and there are places in Essex where the jump occurs from one time zone to another, and at which the standard time is an hour earlier on one side of an invisible line than on the other. Now our Act 32-33 V., c. 21, § 1, defines "night" for the purposes of that Act as commencing at "nine o'clock in the evening of each day and ending at six o'clock in the morning of the next succeeding day," so that by standard time it would be night on one side of the line when it was day on the other; and by sec. 50 *burglary* is defined to be the commission of certain offences in the *night* only, so that the same offence would be burglary on one side the line and not on the other. Mr. Robertson, of Hamilton, has now a Bill before the House of Commons making burglary punishable by imprisonment in the penitentiary for life. Fancy a man tried for burglary in the neighbourhood of that line, and a question arising as to the hour when the offence was committed. But, even in London, the offence would be burglary twenty-four minutes earlier in the evening by standard than by legal time, and the offender, if he did not break in, would have twenty-four minutes longer to break out. Then, again, the Ontario Revised Statute, c. 111, § 22, provides that no Registrar shall receive any instrument for registration except within the hours of ten in

the forenoon and four in the afternoon, and he is to endorse on the instrument registered not only the year, month, and day, but the hour and minute of registration. Now suppose him to shut and open his office in London by standard time, he would shut it twenty-four minutes before, and open it twenty-four minutes before the legal time. Might he not do serious wrong to a person whose mortgage or other claim he received or refused illegally? and might he not be liable in heavy damages for doing so? Or suppose a Returning Officer closing or opening his poll twenty-four minutes before or after the legal time; or a tavern-keeper doing the same by his bar; or a case of insurance with a policy expiring at noon, and a loss occurring after *standard* but before *legal* noon. And so of an infinite variety of cases, where time is of the essence of the act done and its effect. In England, where they look closely into the consequences of such things, difficulties of this kind were foreseen when Greenwich time was adopted for all England in 1880, and an Act, 43-44 V., c. 9, was passed making it *legal time*, which, of course, they knew it would not otherwise be. I can believe that the advantages of the change may there have been greater than the disadvantages; for England is comparatively small, and the greatest difference between standard and the old legal time is only about twenty-two minutes, and there is no jump of an hour; the sea bounds the time zone, so that no one can mistake it; and they have taken care to leave Dublin time for Ireland. Our case and that of the United States is different. We have five jumps of one hour each; and with all due respect for the railway authorities, I think it would have been better if they had adopted or would adopt the time of 90° West Longitude as the standard for the United States and Canada right across the continent—one railway time without jumps or breaks, and the two oceans for the limits of the time zone. A clock with two minute hands, or one hand with two points, would show legal and standard time at once; and there would be no places with *two* standard times, as there are now at the boundary of each time zone. I am informed that the authorities of the Naval Observatory at Washington hold

the same opinion. If any but the present legal time is to be used *as such* the change should be made by law, as it was in England. In the United States, it appears, that every State has power to fix its own legal time; Congress has it only for the District of Columbia (ten miles square, I believe), and has exercised the power by adopting standard time of 75° West Long. But the said District is smaller than England, and there could hardly be a minute of time difference between any two places in it. In Canada, I think the power rests with the Dominion Government. I am of opinion that there should be no change in the legal time; that Canada is too big to adopt one legal time for its sixty or seventy degrees of longitude, and that no jump system could be made rational and workable in law. But I hold that the Dominion Government and the Governments of the several Provinces should state authoritatively that the mean solar time of each place remains as hitherto the *legal* time thereat, and that all officers and functionaries must so consider it, and open and close their offices, and be governed in the performance of their duties, by it and by no other. At the International Conference for the purpose of fixing a prime meridian and universal day, held at Washington in October last, such universal day to begin and end at the same moment all over the world as it does at Greenwich, was adopted "for all the purposes for which it may be *found convenient*, and which shall not interfere with the use of local or other standard time where desirable." It would have made the day at Toronto begin at seventeen and a half minutes after what we now call seven p.m., and Sunday would begin at that hour on Saturday, and end at the same on Sunday. I think this would not be "*found convenient*," and that we in Canada shall not adopt it. It has always been used at Greenwich, I believe for astronomical purposes, except that the day began at noon, and now begins at midnight. It is excellent for scientific purposes, and, for the adoption of Greenwich as the First Meridian, England, and all men of English blood and tongue owe a debt of gratitude to the Conference and to Sanford Fleming.

W.

The Legal News.

VOL. VIII. APRIL 18, 1885. No. 16.

Dr. Francis Wharton has been appointed by Secretary Bayard, legal adviser upon questions of international law. This is a good appointment. Dr. Wharton's works on international and criminal law are highly esteemed, and have been translated into German and Spanish. While referring to this appointment we may note that the *Central Law Journal* (St. Louis) speaks strongly of international responsibility for dynamite warfare. It says: "Funds have been publicly collected in this country for years, by O'Donovan Rossa and his gang, for the avowed purpose of attacking England by secret expeditions of this kind. It is idle to say that we perform our duty to a friendly nation when, having every reason to believe that such expeditions are furnished and fitted out in this country, we take no measures to discover and arrest them. It is no answer to England that our laws do not enable our officials to arrest and punish such conspirators. What concern has England with the state of our municipal law? When we allege the defects of our laws as a reason for not performing our duty to a friendly power, that power is entitled to make answer in the thunder of cannon." Our contemporary then refers to the Fenian raids upon Canada, organized upon U. S. territory, and concludes with the remark: "Plainly, we have not discharged our duty in regard to this dynamite business, and unless we wake up to a sense of that duty, we shall forfeit the right to a decent position in the family of civilized nations."

The weight to be given to the evidence of women of doubtful reputation came under consideration in a recent case in the Court of Queen's Bench, Crown Side. Mr. Justice Ramsay, subsequently correcting a distorted report of his remarks which had appeared in an evening newspaper, observed: "What I did say, in substance, was that a woman might have ceased to be virtuous without becoming

a perjurer, and that experience showed this to be the case. I added that all other things being equal, the evidence of a virtuous woman would be preferred to that of a woman who was the reverse. I never said that I would prevent counsel putting questions to a witness to show that she was an inhabitant of a house of ill-fame, for I have no power to prevent counsel exercising the right of discrediting a witness produced by the other party. There is, of course, a decent and an indecent way of performing even a duty, which gentlemanly feeling will at once suggest to a profession of gentlemen, without the intervention of authority. If that intervention becomes necessary another question may arise, which it is unnecessary to discuss at the present moment."

The *American Law Review* is nothing if not critical—that is to say, apart from the immensely valuable fund of information which it possesses concerning the affairs of this Dominion. Some of its superabundant activity, however, might be usefully applied to a revision of the syntax of its own articles. The opening sentence of the article in the last number, on the Responsibility of the Pullman Palace Car Company, by its colossal proportions, is worthy of Mr. Evarts. It contains 138 words. The writer apparently lost himself in the labyrinth, for the subject of the sentence has no predicate. Our readers may be curious to see this monstrous exordium, so we produce it, using our smallest type from motives of economy.

"The comparatively recent introduction of sleeping cars upon the great highways of travel, as a means of public conveyance, while it marks a new era in the history of common carriers of passengers, and signalizes the advancement of the age in the attainment of the luxuries of refinement and wealth, yet on account of the unique and peculiar features of the system as it exists, both with reference to the railroads that employ them, and to the traveling public that enjoy their superior comforts and facilities, there have arisen interesting questions of law, touching the responsibility of such companies, for the loss or theft of the goods, luggage and valuables of passengers, upon which there exist among the bench and bar, an undesirable, and it would seem, needless amount of uncertainty, not to say, diversity of legal sentiment."

Further on, in the same article, on page 219, the following is found: "The principles of the Roman law touching the doctrine of

innkeepers and their responsibility, is very similar, &c." Old Lindley Murray used to teach that a verb should agree with its subject in number.

The death of Mr. C. S. Cherrier, Q.C., which occurred at Montreal on the 10th instant, marks something like an epoch in the history of the bar. Mr. Cherrier was admitted to the practice of the law in 1822, so that his professional experience extended over the long space of sixty-three years. Lawyers then were not numerous, and Mr. Cherrier was soon engaged in a number of causes of importance. He had for partners several gentlemen who are conspicuous figures in the early annals of the Province. After about forty years of professional toil, Mr. Cherrier was placed, by the death of Mr. Viger, in the possession of an ample fortune, and thenceforward he needed only to labour for the welfare of others. The blessedness of assisting the poor and destitute was enjoyed by him in large measure. After his retirement from the active exercise of his profession Mr. Cherrier was tendered the position of Chief Justice of the Court of Appeal, but he did not care to resign the ease and leisure which were so dear to him for the duties of an arduous and exacting office. In his long retirement he preserved both mental and physical health unimpaired to the venerable age of nearly 87 years.

A NEW QUESTION OF CRIMINAL LAW.

Not long ago the judges in England were gravely deliberating whether it was justifiable homicide to kill your neighbour and eat him, because it was extremely probable that if you did not, both would die of starvation. With a unanimity, for which we should feel thankful, they decided that it was not. Now they are agitated by the question as to whether a cab-man who receives a sovereign for a shilling, and keeps it, is guilty of larceny. The Lord Chief Justice thinks he is, while Mr. Justice Stephen is of a contrary mind. The pretension of the crown seems to be, that the cabman either knew the piece given to him was not a shilling but a sovereign at the time he took it, or that the felonious intent

when he became aware that it was a sovereign dates back to the time he took it. The difference of opinion must be owing to some statutory complication, for the old law on the point is very clear. "And this intent to steal must be when it cometh to his hands or possessions: for if he hath the possession of it once lawfully, though he hath *animus furandi* afterward, and carrieth it away, it is no larceny." Coke; 3 Inst., cap. 47, p. 108.

R.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

[Crown Side.]

MONTREAL, March 20, 1885.

Before RAMSAY, J.

THE QUEEN v. HENRY STERNBERG, and others,
on an indictment for conspiracy with intent to defraud.

Indictment—Conspiracy to secrete property with intent to defraud—Essential allegations.

An indictment for conspiracy with intent to defraud, which merely alleges that the defendants did combine to secrete and make away with the property of one of them, A., with intent to defraud B. of a sum due to him by A., without alleging that A was insolvent and that it was in contemplation of insolvency the secreting was carried out, is insufficient.

The case for the Crown being closed, it was moved on the part of the defendants that there was no case to go to the jury; because there was no evidence of the combination, and because there was no sufficient offence set forth in the indictment.

RAMSAY, J. I intimated at the argument when the objections were made, that if the indictment was sufficient, there was evidence of combination and of fraudulent intent to go to the jury, so I need not enlarge on that point.

As to the second point I am with the defendants. The indictment sets forth that the defendants, to the number of four, did combine to secrete and make away with the property, &c., of one of them, Henry Sternberg, with intent to defraud a London firm of a

sum of money due to said firm by Henry Sternberg. Another count sets up the same thing, with intent to defraud the creditors of the said Henry Sternberg generally, and also the said London firm. There is no allegation that H. Sternberg was insolvent, and that it was in contemplation of insolvency this secreting was carried out. On general principle I don't think it sufficient to allege a conspiracy with intent to defraud, and I don't think the accusation is made more complete by alleging that they did secrete with intent to defraud. We all of us secrete quantities of our property daily, and there is no harm in that. Can it be said that doing so with another person could make it a crime? I think not, and no case has been brought to my notice to support such a pretension.

It has been said that by our civil law it is unlawful to secrete with intent to defraud, and that therefore two or more persons doing so may be indicted for the conspiracy to do such a thing. This is an ingenious argument. It is, however, to be observed that the prohibition is to the secreting by the owner with intent to defraud. Again, this particular Act gives two remedies against the owner—the right to *caption* him and the right to attach his property. And lastly, these remedies can only be acquired on a special affidavit as to a reunion of circumstances of which we have no evidence here. The limits of conspiracy are tolerably vague, and much is left to the discretion of the judge, but I am not disposed to extend these limits so far as is sought to be done in this case, even though there is serious ground for supposing that fraud has been practised.

The jury was directed to acquit.

Archambault, Q. C., for the defendant.

COURT OF QUEEN'S BENCH.

[Crown Side.]

MONTREAL, March 23, 1885.

Before RAMSAY, J.

THE QUEEN V. JOSHUA STANSFELD.

Indictment—Trustee fraudulently converting property.

1. In an indictment of a trustee for fraudulently converting property, it is sufficient to set out

that A "being a trustee" did, etc., instead of that A "was a trustee and being such trustee" did, etc.

2. It is not necessary to set out the trust in the indictment.

RAMSAY, J. This is a motion to quash an indictment under 32 and 33 Vic., c. 21, sect. 81. Trustees fraudulently converting property.

Two objections are taken to the indictment. The first is, that the indictment is not in positive terms. The words are "then being a trustee." The accepted form of criminal pleading is to lay every act directly in the indicative and not as it is called inferentially; thus instead of saying that, "—being a trustee did," it is usual to say that "—was a trustee," and being such trustee did, and so on.

After verdict, all objections of this sort are cured by the latter part of section 79, 32 and 33 Vic., cap. 29. But in addition to this, section 27 of the same act specially declares that the forms of indictment contained in schedule A to this act shall be sufficient, as respects the several offences to which they respectively relate; and as respects offences not mentioned in the schedule, the said forms shall serve as a guide to shew the manner in which the offences are to be charged, and the indictment is declared to be good if, in the opinion of the court, the prisoner will sustain no injury from its being held to be so, and the offence or offences intended to be charged by it can be understood from it. Turning to the schedule A, we find that the general form instructs the pleader to "describe the offence in the terms in which it is described in the law; or" etc. That has been done. Then in the special forms given in the schedule for "embezzlement," "offences against the habitation," and "bigamy," the present participle is used, precisely as in the indictment before us.

Lastly, it appears to me that, grammatically speaking, it is the same thing to say, that "A being a trustee did," and to say, that "A was a trustee, and so being such trustee did." If one is inferential so is the other. Further, I think the accused cannot suffer any injury by it; but that on the contrary the offence charged is more easily understood when

expressed in the former simple language rather than in the latter involved way.

The second objection is that the trust is not set forth. What has been said with regard to the general form is equally applicable to this objection, and in practice in England, it seems, it is not usual to set out the trust. Even where the trust is created by an instrument in writing it would be sufficient to describe it by its usual name or by its designation. Sect. 24, 32 and 33 Vic., c. 29.

The defendant will therefore take nothing by his motion.

Davidson, Q. C., for the Crown.

Kerr, Q. C., for the defendant.

COURT OF QUEEN'S BENCH.

[Crown Side.]

MONTREAL, March 1885.

Before RAMSAY, J.

THE QUEEN V. JUDAH.

False Pretence—Warranty in deed.

A clause of a deed by which the borrower of a sum of money falsely declares a property well and truly to belong to him may constitute a false pretence.

The defendant was charged with having obtained \$25,000 by false pretences. See 7 Legal News, pp. 371, 385, 396.

The evidence establishes that defendant wished to pay off an hypothec on certain real estate, and applied to a broker to procure him the money on the same security as the hypothecary claim to be paid off. The broker opened communications with the complainant, and finally it was agreed that if the titles were satisfactory, complainant would furnish the money. The name of the defendant was then furnished, and the complainant left the termination of the affair in the hands of a notary, with verbal instructions that the money, which he paid over to the notary, should not be delivered to the defendant except in payment of the hypothec on the property. The defendant agreed to all this, and went to the notary's office and signed the deed, which contained in printed form, after describing the property to be hypothecated, this unusual warranty: "Which he declares well and truly to belong to him,

"and to be free and clear of all hypothecs and incumbrances whatsoever." In fact this statement was untrue. To defendant's knowledge, two-thirds belonged to his daughter, as heir of her mother, who had been *commune en biens* with defendant and of her only brother deceased since the mother's death.

The notary being examined as a witness said, that after signing the deed, defendant "said there were some pretty strong clauses in the deed, pointing to the clause referred to and read by Mr. Burland in his evidence. He said the property belonged to him, and he said that he knew of no other encumbrances or mortgages on the property, except the three mortgages which I was to discharge, viz., Chadwick, the Seminary and the Nuns' mortgages. He said he would not like to sign anything that would put him in jail. I then said to him, is the property not all clear, except above mentioned mortgages? The defendant answered yes. I then said he could sign without fear." The notary further swore that he would not have given the money without the assurance from the defendant, that the property was his. He also established that the money was applied to the discharge of defendant's indebtedness, as it was understood it should be applied.

In cross-examination it was shown that the notary not only had the titles but that he had been guided, to some extent, by a legal opinion he found among the papers, and in which it was declared that the title was satisfactory.

In the cross-examination of Mr. Withers, the financial agent through whom the loan was effected, a witness produced by the prosecution, it was established that loans on the mortgage of real estate were never made on the assurances of the borrower, but on the report of a lawyer or notary, or both.

It was established that the defendant knew of the defect in his title, which was not apparent either by the deeds themselves or by registration, for that the matter had twice since 1874 been brought to his notice.

The case for the crown being closed, the defendant, who conducted his own defence, moved the Court to direct the jury to acquit, there being no false pretence proved but only

a breach of contract. He relied on the *King & Codrington*, (1 C. & P. 661) and the *Queen & Durocher*, (not reported) decided in this Court, which last case he believed to have been decided by the Court as now constituted.

Mr. Davidson, Q. C., in reply, said that *Rex & Codrington* had been, in effect, over-ruled, and he referred to the cases of *Abbott*, of *Dark*, of *Burgon* and of *Meakin*.

RAMEY, J. I sat in the case of *Durocher*, and although I have no note of the point except the barest mention, I remember to have held that a bad title was not necessarily a false pretence. I never said that there might not be a false pretence by means of a deed. This is all I understand to have been decided in *Rex & Codrington*. See what Brett, J., said at the argument in *Reg. v. Meakin*, 11 Cox, p. 273. The cases of *Reg. v. Abbott*, 1 Den. C. C., 273; 2 C. & K., 630; 2 Cox, C. C.; *Reg. v. Dark*, 1 Den. C. C. 276; and *Reg. v. Burgon*, 25 L. J. 105 M. C., don't apply at all. They were material false pretences. In all the cases the defendants obtained money by producing one thing for another in a grossly fraudulent manner. It will be observed that although, in some of the cases, the judges questioned the ruling in *Rex & Codrington*, they took especial care not to over-rule it. I cannot concur with the criticism of *Rex & Codrington*, by Lord Chief Justice Denman, in the *Queen & Kernick* (5 Q. B. 49). Whatever may be the law of England, it could not be maintained for an instant under our highly organized and logical system of law, that the conversations which preceded the written contract, not persisted in by the contract, could be the inducement to make the contract. Our rule is that you cannot prove *outré le contenu de l'acte*. This is a sound rule of evidence, and to expose people to being held criminally responsible for mere talk at the time, as it may chance to be remembered, after the whole matter had been reduced to writing, would be excessively dangerous. I therefore had some difficulty at first in admitting Mr. Lighthall's evidence as to the conversation. But it will be at once seen that this evidence was rightly admitted in this case, for two reasons: It did not contradict the written instrument, and it was

useful to meet a defence which might have been set up plausibly, had there been no such evidence, namely, that the false warranty was unusual, was contained in a printed form, and had been passed unobserved by the defendant when he signed. He might have found an illustration in support of such a contention in the same deed. Alongside the words alleged to be false and fraudulent, there is a warranty that there were no hypothecs. This is palpably false, yet the defendant signed it inadvertently. As for the case of *Reg. v. Meakin*, 11 Cox, 270, I purpose to follow it precisely. The case before us is one of mixed law and fact, and it must go to the jury. I shall endeavour to present to them the legal aspect of the case, and leave to them the duty of applying the law so explained to the facts as proved.

The defendant was convicted.

Davidson, Q. C., for the Crown.

The defendant in person.

PRIVILEGE IN RELATION TO CRIMINAL ISSUES.

The case of *Regina v. Cox*, 54 Law J. Rep. M. C. 41, reported in the March number of the Law Journal Reports, decides once for all a very important question of professional law, upon which considerable difference of opinion has been expressed from time to time. How far may a solicitor be compelled to disclose communications made to him by a client in a criminal case or upon the trial of an issue involving a crime? The judgment was delivered by Mr. Justice Stephen on behalf of the ten judges who composed the Court. It is noticeable that the Lord Chief Justice of England, who is ordinarily essential to the constitution of the Court, was absent, and no doubt his absence was justified on the ground allowed by the statute—namely, that it is signified by writing under his hand, or that of his medical attendant, that he is prevented by illness or otherwise from being present. The decision is that of the highest Court of Appeal on the question, which is one incapable of being raised on a writ of error and taken to the House of Lords, and it undoubtedly goes very far in opening the mouth and the document box of the solicitor in a criminal case. Happily it does not

go quite so far as the words attributed to Mr Justice Lush in *Regina v. Castro*—namely, 'that the law does not allow in the name of privilege any person to withhold evidence which is within his power and which may be used in support of a criminal charge.' Mr. Justice Lush's words would force a solicitor to disclose what his client told him after he was accused for the purposes of his defence. The learned judge could not have intended to go so far, otherwise the crucial question which the solicitor engaged to defend an accused person is popularly supposed to put to his client—namely, 'Are you in truth guilty or not?'—would be hazardous. The learned judge could not have meant that an accused person could be convicted by a confession after the fact to his legal adviser. Mr. Justice Stephen's judgment in any case deals directly with the matter. He says: 'We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case.' This shows that many questions of nicety are still open. Suppose, for example, a man comes to his solicitor and asks him whether there is an extradition treaty between Spain and England, would the solicitor be bound to disclose the fact in the witness-box at his trial? Probably he would, although the communication took place after the alleged crime, because the information was required with a view to escape from justice.

The facts in *Regina v. Cox and Railton* were such as have often happened before, and will frequently happen again. Railton, in the character of proprietor of a newspaper, had been ordered to pay damages and costs. Cox, the other defendant, was his partner, and the deed of partnership had been prepared by Mr. Goodman, a solicitor. A few days after the verdict the two defendants repaired to Mr. Goodman, and asked him whether Railton, the defendant in the civil action, could not give a bill of sale to Cox, his partner, to protect the plant of the newspaper from seizure. They were told that he could not, whereupon they paid their fee and departed. Afterwards, when the sheriff appeared at the

newspaper office, a bill of sale was produced duly executed and registered some days previously, together with the partnership deed, endorsed with a memorandum of dissolution dated before the bringing of the action. Cox and Railton were indicted before the Recorder of London, and found guilty by the jury, but the recorder reserved the question whether the evidence of Mr. Goodman ought to have been admitted. On the one hand it was clear that the communication with Mr. Goodman took place before the crime was committed, and with a view to obtain information as to the form which it ought to take. On the other hand it was obvious that Mr. Goodman was not *particeps criminis*. It was argued for the prisoners that evidence of this kind is not admissible unless the solicitor is cognisant of the crime, but the argument was disposed of by a consideration thrown out in the judgment. The privilege is based on confidence, and, if the confidence is only one-sided, the privilege does not exist. How could Mr. Goodman by any disclosure be made to betray a confidence which was not reposed in him? As the Latin Grammar says: '*Fides et fiducia sunt relativa.*' The one cannot exist without the other, and Mr. Goodman broke no trust, because Cox and Railton committed no trust to his keeping. They studiously kept back the fact that they proposed *quocunque modo* to prevent execution being levied on the plant of their newspaper. The communication was not confidential because the criminal purpose was concealed, and so the confidence did not exist. On the other hand, suppose the solicitor consulted had been told the client's object, the evidence would still have been inadmissible, but on a different principle—namely, that the whole communication was in furtherance of an illegal purpose. The cases cited and considered in the course of the argument, show how tender the law has always been of the privilege in question. The most authoritative of them is that of *Cromack v. Heathcote*, 1 B. & B., decided in 1820 by the full Court of Common Pleas, consisting of Chief Justice Dallas and Justices Burrough and Richardson. The circumstances of that case were very similar to the present; and it was held that, in order

to prove that a deed of assignment was fraudulent as against an execution creditor, an attorney to whom the execution debtor had applied to draw the deed, and who had declined on the ground that execution had issued, could not be called to give evidence. Mr. Justice Stephen points out that the only question argued in that case was whether the privilege extended only to communications in the course of a cause. Upon that subject it is still an authority; but the result of it must now be considered as overruled by the decision of the Court of Crown Cases Reserved. In theory, we suppose the decision of the Common Pleas ought to prevail in a civil action, but practically no judge would now follow the three judges in *Cromack v. Heathcote*, now that their opinion has been dissented from by ten judges upon a point not argued before the three. Two other cases decided by single judges must be definitely considered overruled. The first is *Rez v. Smith*, 1 Phil. & A. 118, in which Mr. Justice Holroyd refused to compel an attorney to produce a forged promissory note which had been given to him by a client with instructions to bring an action upon it. The other is *Doe v. Harris*, 5 Car. & P. 592, in which Mr. Justice Parke followed *Cromack v. Heathcote*. The Court, while overruling these two cases, and declining to follow *Cromack v. Heathcote* mechanically, is supported by the principles laid down in a number of cases which were cited in the judgment, but mainly by a decisive consideration of public policy. If the contrary decision had been arrived at, as Mr. Justice Stephen points out, 'the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity.' Upon an examination of the authorities, a conclusion was arrived at that the rule contended for by the defendants' counsel, which had such monstrous consequences as to reduce it to an absurdity, was not warranted by any principle or rule of English law.

The best general principle to be extracted from the case is to be found towards the end of the judgment, where Mr. Justice Stephen lays down that, 'in each particular case, the Court must determine upon the facts actually

given in evidence, or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it.' Perhaps the words 'whether it seems probable' hardly go far enough, as the judge is bound in many cases to decide adversely to the prisoner the same question as that which the jury will have to try in order to admit the evidence. There need, however, be no inconvenience in this, so long as care is taken that the jury do not hear the evidence given or proposed to be given. Practically, the decision would seem to come to this, that communications made in furtherance of a criminal object are not protected by privilege, except when that object is the successful defence of the accused before the Court which tries him, and the communication is made after the event. The result is not only in accordance with public policy, but relieves the breast of legal advisers of a weight which they would rather not bear.—*Law Journal*, (London.)

INTEREST ON COSTS.

A point of practice of some considerable interest to suitors is the question from what date the costs of an action bear interest. There is no doubt that the old equity rule was, that the interest ran, not from the date of the judgment, but from that of the certificate of taxation. See section (last ed.) 130. At common law the matter was not quite so clear, and there were decisions which went to show that the date from which the interest ran was the date of the judgment. In *Schroeder v. Cleugh*, 46 L. J. C. P. 365, 35 L. T. Rep. N. S. 850, however, the question was considered by three judges of the common pleas division, after the judicature acts had come into operation, and they decided in favor of the old equity rule. So the matter stood when the case of *Hyman v. Burt*, 76 L.T. 425, Weekly Notes, 1884, 100, came before Mr. Justice Field in chambers, and he decided in favor of the right date being the date of the judgment. Lastly, the same point came up again before Mr. Justice Pearson, in *Land-*

owners West of England, etc., Company v. Ashford, on the thirtieth of October, and the learned judge seemed inclined to decide in the contrary sense to Mr. Justice Field, but, on being told that the decision of Mr. Justice Field was supported by one of Mr. Justice Chitty, in *The Atlantic Mutual Fire Ins. Co. v. Huth*, on the twenty-first of December, 1883, Mr. Justice Pearson felt himself obliged to follow those authorities, which, he said, were too strong for him. It appears, however, that *Atlantic, etc., Co. v. Huth* was not a decision at all upon the date from which the interest ran, but upon the question whether, on the facts of the case, any interest at all ought to be paid on the costs or not. The point that the interest ought to run from the date of the judgment does not appear to have been argued or suggested, and Mr. Justice Chitty is stated to have said that interest ran by statute from the date of the certificate, and that the usual four per cent. interest must be paid from that date. But for the reference to *Atlantic, etc., Co. v. Huth*, it seems very probable that the decision of Mr. Justice Pearson would have been in accordance with that in *Schroeder v. Cleugh*, so that, so far from the point now being a settled one, as would appear at first sight to be the case, it must be regarded as more doubtful than ever, and in an eminently fit condition for the handling of the court of appeal.—*Law Times*.

JURISPRUDENCE FRANÇAISE.

Assurances terrestres—Propriétaire assuré—Locataire—Clause subrogative de l'assureur aux droits de l'assuré—Cession de créance—Sinistre—Saisie-arrêt—Validité.

La clause d'une police d'assurance contre l'incendie, par laquelle l'assuré déclare subroger, de plein droit, l'assureur dans tous ses droits, actions et recours contre les tiers à raison de l'incendie, ne vaut pas au profit de l'assureur comme subrogation, mais comme cession de droits éventuels et aléatoires soumise à la seule condition de l'événement de l'incendie des meubles assurés.

Mais la dite cession étant parfaite par le seul fait de l'événement de l'incendie, l'assureur est en droit d'exiger des tiers, notamment des locataires responsables, aussitôt

cet événement, le paiement, entre ses mains, de la somme due pour le dommage éprouvé par le propriétaire assuré, sans être tenu de justifier de l'acquit préalable de l'indemnité aux mains de ce dernier.

Une saisie-arrêt pratiquée pour procurer ce paiement ne peut donc être annulée par l'unique motif que l'assureur, qui l'a formée, n'aurait pas préalablement désintéressé le propriétaire incendié.

(3 fév. 1885. *Cass. Gaz. Pal.* 21 fév. 1885.)

Testament olographe—Signature—Défaut—Ecrit en fermé dans une enveloppe signée—Nullité.

L'apposition de la signature est une formalité essentielle du testament olographe, et la seule qui atteste que l'écrit n'est pas un simple projet, mais bien un acte définitif. Par suite, doit être considéré comme nul l'écrit non signé émané du défunt, bien qu'il soit contenu dans une enveloppe gommée dont la suscription, indiquant qu'elle contient un testament, a été datée et signée par le *de cujus*. L'enveloppe n'est en effet réunie au testament par aucun lien matériel et nécessaire et n'en est pas partie intégrante.

GENERAL NOTES.

The *Law Times* (London) says: "The Lord Chancellor is evidently no believer in codification of the law. He holds out to the commercial world practically no hope that any branch of the law affecting them will be codified under government supervision. We shall not regret it if the present government avoids the great duty. They blunder with so much persistency, that we should like to see fresh minds brought to bear. With the Master of the Rolls or Sir Farrer Herschell on the woolsack, matters would assume a very different aspect."

A correspondent of the *London Times* writes:—"Now that the subject of Imperial Federation is occupying the attention of the powers that be, will you kindly allow me space for a suggestion? The want of a system of reciprocal legal procedure between the mother country and the colonies, as well as between the colonies themselves, has been a long-felt evil, and I venture to think that, with the increasing commercial relations the time has now arrived, and the opportunity too, when some steps should be taken to remedy the evil. A debtor, who now betakes himself to another colony with a letter of credit on a bank there, has only to withdraw his balance from his local bank and remain where he is, and his creditors find themselves foiled. The evil is, however, not confined to cases of contract, but abounds in cases of tort, where the wrong doer finds an easy escape from the consequences of his acts, provided they are not criminal, by taking a ticket for 'the other side.'"

The Legal News.

VOL. VIII. APRIL 25, 1885. No. 17.

LEGISLATION.

The enormous cost of legislation by parliaments is not its greatest drawback. The imperfection of the work may be reduced to a *minimum*, without much difficulty. The great danger consists in the proneness of such bodies to be carried away by hastily conceived opinions. The difficulty in dealing with this is, that the motives which prompt enthusiasm are generally respectable. Philanthropists constantly and it may almost be said, systematically disregard two considerations, which it is important to keep always in mind. First, an abstract truth is not always practically applicable. Second, the surface view is seldom correct. This is impliedly admitted in the familiar expressions: "such and such a view is a superficial one,"—"it does not go to the root of the question."

"Errors, like straws, upon the surface flow:
He who would search for pearls, must dive below."

The bills presented to parliament every session furnish examples which strikingly illustrate this danger. Many of them are strangled by the tactics of those who, having the direct responsibility of results, are interested in stopping bad measures; but some arouse sympathies, and enlist interests, which are not subject to such control. In addition, there is the not unnatural desire to show something done, as a return for the cost of all this machinery. This last snare is quite as great for the dignified pieces as for the pawns.

The present session has not been lacking in the suggestion of perilous legislation. The three bills to which it is intended, now, to direct attention particularly, have met with serious support from members whose influence is not only great, but generally deserved.

The first in the order of date of presentation to the house, is the bill to amend the law of evidence in criminal matters, by making the person charged, and his wife, or her hus-

band, as the case may be, a competent witness on every hearing, at every stage of such charge. The bill provides that the person charged cannot be compelled to be a witness on any such hearing, or the wife or husband, without the consent of the person charged.

No statistics are produced to establish that the law as it stands works injustice. It is pure theory, and two arguments—only two—are urged in support of this fundamental change in the criminal law.

The first is, that the evidence of the accused is admitted as to assaults, and that therefore it should not be refused as to greater offences. There are certain arguments which do not merit a formal refutation, although they may have influence with a certain class. We may say of this one, with Rabelais:—"Ainsi (Antiphysie) * * tiroyt tous les folz et insenssez en sa sentence, et estoyt en admiration à toutes gens exceruelez et desguarniz de bon jugement et sens commun."

The other argument is, that although the person charged will not be believed, it is fair to give him the right to swear to his story, as it is *his only chance*. This may be called the sporting argument. Don't shoot a bird sitting, a hare in her form, or a stag at gaze.

It is not intended to answer such trivial arguments, advanced to overwhelm the experience of the civilized world; but there is a consideration which has not been put forward, and it may have weight with those who are not too fatuous to listen to reason.

It is evidently meant, by this proposed law, to confer benefits on the accused. By an amendment to the bill, the member for West Huron admits, that his proffered gifts conceal a real danger. Evidently it is an advantage to the self-confident man, particularly if guilty; it is a manifest disadvantage to a timid one, no matter how innocent. But, to go to the root of the question, the great objection to making a person charged with crime a witness in his own case depends on a dogma of the English criminal law, which assumes that a man should not be compelled to criminate himself, because it would be a violation of the natural right of self-defence. If this be sound as a moral rule, it justifies the false oath, precisely as it justifies the plea of "not guilty," and therefore the solemnity

of the oath is at an end. If this dogma be ill-founded in morals, then it must be admitted that, whether the person charged is allowed to be a witness or not is a mere matter of convenience. In the latter case, however, the French system is infinitely preferable to the disjointed and irrational one proposed here. It is worthy of note, that obviously, by the terms of the bill, and more particularly, by its terms as amended, Mr. Cameron and the majority of the House of Commons never contemplated for an instant upsetting the English idea that a man should not be compelled to criminate himself: on the contrary they re-affirm it.

The bill, "An Act concerning Insolvency," is a measure with the dangers of which we are familiar. Twice within the last thirty-six years, have laws of this sort been abrogated under a perfect storm of execration and abuse. It was a common joke after the old law was repealed, that there would be no new law on the subject till the insolvent interest became formidable. The authors of the present bill were aware of the suspicions naturally attaching to bankruptcy and insolvency legislation, and to disarm distrust, they have invented the novel device of prefixing a chapter of general remarks on its principles and provisions. There is no objection to a preliminary statement of principles, but the pompous exposition before us advances no principle about which any reasonable man ever had the least doubt. The principle it would have been interesting to have had laid down is as to whether it is intended by the bill to give a protection to the creditor, or a favour to the debtor. On this point the general remarks are ominously reticent. The only defensible principle of legislation as to insolvent estates, is to give the cheapest and most expeditious mode conceivable of paying the creditor what is due to him. It is sometimes said, that if the debtor gives up all his property, he has a right to be discharged from further liability. He has no such right. In giving up what will pay his creditor, he merely surrenders that which is not his. Another argument is, that if there be an insolvent act the creditor knew when he gave credit that the law would probably discharge his debtor if he became insolvent

This argument is almost facetious. It would justify the abolition of every civil remedy. But, in any case, if that be the justification, Mr. Billy's bill should not apply to any debt created before its enactment. Such a rider would considerably decrease the enthusiasm in favour of a new "Act respecting Insolvency." Lastly, there is the old argument of the favour to be accorded to trade and commerce, owing to its risk, which no prudence could foresee. Insurance and improved appliances have removed any shadow of reason for this plea, rather specious than real at any time.

An Act respecting the Electoral Franchise contains clauses more profoundly dangerous to society than either of the bills referred to. With his usual amiability, and good taste, the member for Ottawa County has thrown such a halo round the objectionable clauses as nearly to silence their most determined adversary. It is a subject, however, about which there can be no compromise. They are introductory of the greatest revolution ever proposed in the social order. To say that it is to go no further than giving the right to unmarried women to vote is a mere pretext. Every right must follow in the wake to all women, married or single. The next cry will be, "how can you refuse, to the mother of a family the right you grant to every shrewish old maid." There is no honest purpose to be served in disguising the issue. These clauses, if passed, would form a direct and an important step towards destroying the family, by changing the relation of the sexes, and thus overthrowing the headship of the husband. This is in violation of the experience of the world, civilized and uncivilized, in all ages; and it is in directly in opposition to the teaching of the New Testament—particularly if we leave unmodified the interesting and novel doctrine of *Finfluence induue*, as preached by the Supreme Court. From the predications of that learned body, let us turn to one of St. Paul's. In the same chapter in which he commands wives to be in subjection unto their husbands, he gives this advice, which should be pondered over by those who have, not so much the privilege of legislating as, the responsibility of legislation:

"Let no man deceive you with vain words": neither the accomplished and persuasive Premier, nor yet the genial and tender King of the Gatineau.

R.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, Feb. 7, 1885.

Before DORION, C. J., RAMSAY, TREBINE, CROSS, and BABY, JJ.

BARRAS (Petitioner in Prohibition), Appellant, and THE CORPORATION OF THE CITY OF QUEBEC, (Defendants below), Respondents.

29 Vic., c. 57, s. 29, ss. 78—*Navigation of River St. Lawrence—Interference with ice-bridge at Quebec.*

Held:—1. *That the Legislature of the heretofore Province of Canada had power to authorize the Corporation of Quebec to make by-laws prohibiting under a penalty any interference with the ice-bridge across the River St. Lawrence, or with the ice stopping and forming a bridge, even by a steamer navigating the river.*

2. *That the Recorder of Quebec has jurisdiction to try complaints of violation of the by-law made under the authority above mentioned.*

The appeal was from a judgment of the Superior Court, Casault, J., maintaining a demurrer. The appellant was prosecuted before the Recorder's Court of the City of Quebec, for damaging and breaking up the ice which was forming a bridge near Cap Rouge, the petitioner being the person in command and in charge of a steamboat called the Prince Edward.

Thereupon he petitioned for a writ of prohibition, alleging that in issuing the summons and in calling upon him to defend himself from the above charge, the Recorder's Court was exceeding its jurisdiction. Among other reasons were the following: (3) Because the River St. Lawrence is a navigable river, within the ebb and flow of the tide, upon which all Her Majesty's subjects have a right to navigate at all times and seasons in such manner as they may choose. (4) Because the Corporation of the City of Quebec has no

right whatever to pass a by-law pretending to restrict the right of Her Majesty's subjects to freely navigate the River St. Lawrence at all times and seasons as they may choose. (5) Because the only body having a legal power to regulate and control the navigation of the St. Lawrence, near the City of Quebec, is the Quebec Harbour Commissioners, who have passed no by-law creating any such offence as that charged in the summons.

To this petition the Corporation demurred, on the ground that the statute and by-law were valid, and the right of navigation was subject to restrictions lawfully placed thereon.

The Superior Court maintained the demurrer and dismissed the petition, for the following reasons:—

"Considérant que la législature de la ci-devant Province du Canada avait le pouvoir de conférer à la corporation de la cité de Québec, celui de faire des règlements pour défendre, sous peine d'amende, d'empêcher, de quelque manière que ce fût, la glace de s'arrêter et de former un pont sur la fleuve St. Laurent, ou de casser, briser ou endommager le pont déjà formé et arrêté, et que le règlement fait à ce sujet par le Conseil de la dite Corporation, est en tout conforme à la loi;

"Considérant que le Recorder de la cité de Québec avait juridiction pour connaître de la plainte portée contre le requérant, pour violation du dit règlement, et que les moyens de prohibition invoqués par le dit requérant ne sont pas fondés en droit, la défense en droit est maintenue," etc.

This judgment was affirmed in appeal.

RAMSAY, J. (diss.)—This case gives rise to a question of conflict of authority. The Corporation of Quebec has authority of law by its charter (29 Vic., c. 57, s. 29, ss. 78), "To prohibit any person from preventing, in any manner whatever, the ice from stopping and forming a bridge on the River St. Lawrence, from Montmorency river, as far as and comprising the place called Cap Rouge on the said river, or from breaking, shattering or damaging in any manner whatsoever, all such ice or ice bridge formed or stopped in the said limits," and to punish by a penalty. It has exercised this power by passing a By-law in the terms of the

statute; and it now seeks to recover the penalty against the appellant, for that he being in command of a steamboat called the "Prince Edward," "did damage the said ice so stopped and formed in a bridge as aforesaid on the said River St. Lawrence, in the manner following, to wit, by then and there causing the said steamboat 'Prince Edward' to ply through the said ice and shatter the said ice so stopped," &c.

Appellant contends that the complaint sets forth that he was navigating a steamer, and that in so doing he shattered the ice, and that this is not within the statute, which does not authorize the Corporation of Quebec to interfere with the navigation, and therefore he seeks to have the Recorder prohibited. This prohibition has been set aside on demurrer. I think the judgment bad. The navigation of the St. Lawrence is provided for by another statute and different arrangements altogether, and the object of the law was not to allow the Corporation of Quebec to interfere with the navigation of the St. Lawrence, but only to prevent people interfering with the solidity of the ice bridge, and in fact the statute cited in support of the jurisdiction does not expressly give the Corporation such power. It will perhaps be said that it is not within the powers of the Corporation to stop navigation, but that whether navigation or not is a matter of evidence and does not affect the jurisdiction which is vested in the Recorder. This distinction might be very good if the complaint had been drawn, so as to disguise the facts complained of. Very properly this has not been done, and the complaint is that a steamer "plying" in the river and through the ice, shattered the ice stopped, &c. I do not for an instant question the right of the Corporation to stop a malicious interference with the ice bridge, which is a means of communication provided by nature, but I think that the principal use of a great navigable river is for the purposes of navigation, and not for the temporary and almost accidental use as a frozen road, or bridge; and at all events, the prohibition should not have been set aside on demurrer, especially in face of the fact that the complaint unexplained, implied that the steamer was navigating the St. Lawrence. I am to

reverse and to maintain the prohibition.

The majority of the Court were of opinion that the right of crossing the river on the ice during the winter is a public right, and could not be interfered with by anybody. The ice formed a natural highway, and the protection of it was not an interference with navigation. Further, it did not appear by the complaint that it was for purposes of navigation that the appellant damaged the ice-bridge.

Judgment confirmed.

J. Dunbar, Q.C., for Appellant.

L. G. Baillargé, Q.C., for Respondent.

Pelletier & Chouinard, Counsel.

SUPERIOR COURT—MONTREAL.*

Partner — Illegal conversion of partnership funds to pay private debt of partner—Rights of co-partners.—Held, where a partner sent a draft for £1,000 out of the partnership funds for the purpose of paying his own separate debt, that the act was an illegal conversion of the funds, and that the other partners were entitled to attach the money in the hands of the person to whom the draft was transmitted, and to prevent him from applying it to the payment of the separate debt in accordance with the instructions received by him from his principal.—*Hannan et al. v. Evans et al.*, and *Buller, T.S.*

Séquestre—Reddition de compte—Contestation—Substitution de procureur.—Jugé, Que l'avocat dans une demande en reddition de compte a mandat pour représenter l'oyant compte sur la contestation de ce compte, lequel ne pourra être contesté par un autre avocat qu'après que ce dernier aura été dûment substitué au premier.—*Poirier v. Laberge, et Resther, Séq.*

Acte électoral de Québec—Liste électorale—Devoirs du secrétaire et du maire—Solidarité—Pénalité—Interprétation.—Jugé, 1o. Que le maire d'une municipalité ne peut être poursuivi en recouvrement de la pénalité imposée par l'Acte électoral de Québec, pour ne pas avoir transmis dans les délais un double de la liste des électeurs au registrateur, tant que le secrétaire-trésorier n'a pas entièrement

*The above cases will be reported in full in the Montreal Law Reports, 1 S.C.

complété cette liste, la négligence du maire, et partant sa responsabilité, ne commençant qu'à cette complétion.

20. Que lorsqu'un statut décrète qu'à défaut de remplir certains devoirs, chacune de deux personnes pourra être condamnée à payer une somme de \$200 d'amende, on ne peut les poursuivre séparément pour \$200 chacune, mais qu'il faut prendre une seule action pour une dette de \$200 contre les deux ensemble.—*Berthiaume v. Sicotte*.

Billet—Timbres—Garantie—Vice apparent—Etendue de la garantie—Mise en demeure—Frais.—Jugé, Dans une action en garantie:—10. Que celui qui transporte un billet insuffisamment timbré n'est pas tenu de garantir le porteur, vu que ce défaut est un vice apparent qui ce dernier a pu et dû connaître lorsqu'il a acquis le billet.

20. Que lorsque le cessionnaire d'un billet promissoire appelle en garantie son cédant sur le plaidoyer de libération d'un des endosseurs, il a droit de demander que le prix d'achat qu'il a payé lui soit remis, et ce qu'il aura reçu d'un autre endosseur ne pourra être compté en déduction, mais, à son tour, il doit offrir de remettre le cédant dans la même position où il était avant le transport.

30. Que quoique le garant ne puisse répondre à l'action en garantie en alléguant le mal fondé des moyens opposés au garanti, néanmoins lorsque les parties auront lié contestation sur la vérité même de ces moyens, la Cour de Révision ne pourra pour cette raison seule, modifier le jugement rendu en première instance.

40. Qu'aucune dénonciation n'est requise avant l'action en garantie, la mise en demeure se faisant par l'action même.

50. Que quoiqu'en Révision, comme en Appel, la question des frais soit secondaire, cependant, lorsqu'elle implique la violation d'un principe, les tribunaux ne doivent pas l'écarter, et, dans ce cas, un jugement pourra être réformé sur ce point seul.—*Lamarche v. La Banque Ville Marie*.

Créances non échues—Nantissement de créances—Tierce-opposition—Défense en droit.—Jugé, Que l'on peut valablement transporter des cré-

ances non-échues, et le transport ne fût-il fait que comme sûreté collatérale, les créanciers du cédant ne peuvent demander à être colloqué au marc la livre.—*De Bellefeuille v. Ross et vir, et Stearns et al., T.S.*

Taxes pour construction d'église—Evocation—Droits futurs.—Jugé, Qu'une action réclamant le premier paiement d'une répartition pour la construction d'une église, laquelle répartition est payable en douze versements annuels, ne peut être évoquée à la Cour Supérieure de la Cour de Circuit comme affectant des droits futurs, ce dernier tribunal seul ayant juridiction.—*Les Syndics de la Paroisse de Ste. Cuthgonde v. Coursol et al.*

Saisie-exécution—Licence d'auberge—Contestation—Frais.—Jugé—10. Qu'une licence pour vendre des boissons éniivrantes, n'étant que la preuve écrite d'un droit confié à une personne par l'autorité compétente, et la loi ayant pourvu à un mode spécial de transporter le droit lui-même, le créancier ne peut la saisir en exécution d'un jugement, comme il peut le faire pour les titres mentionnés aux articles 557 et 565 du Code de Procédure Civile.

20. Qu'un créancier est justifiable de contester une opposition faite par une femme mariée, qui fait le commerce sous le nom de son mari, à une saisie pratiquée contre ce dernier; et que, dans le cas où l'opposition serait maintenue, chaque partie devra payer ses frais, le créancier ayant pu être trompé et croire à la fraude.—*Van de Vliet v. Féniau, et Féniau et al., oppts.*

Action qui tam—Affidavit irrégulier.—Jugé—10. Que l'absence, la nullité ou l'insuffisance de l'affidavit requis pour intenter une action qui tam sont des matières d'ordre public, et peuvent être invoquées en tout état de cause, sans être plaidées, le juge devant, s'il était nécessaire, en prendre connaissance ex officio.

20. Que l'affidavit nécessaire pour l'émanation du bref dans une action qui tam doit faire apparaître la cause de l'action, il ne suffit pas de référer au chapitre du statut.—*Mette v. Davis*.

Rapport d'experts—Homologation—Irrégularités.—*Jugé*, Que les tribunaux doivent autant que possible accueillir favorablement les rapports d'experts, et ne les rejeter qu'en autant qu'il y a eu des irrégularités et des illégalités de nature à porter préjudice aux parties.—*Cannavan et vir v. Bryson et qual.*

Action en dommage—Mineur émancipé—Action pour injures.—*Jugé*, Qu'un mineur émancipé par mariage peut, sans l'assistance de son curateur, intenter les actions mobilières, et, par suite, poursuivre en dommages pour injures.—*Müller v. Cleroux.*

Action en dommage—Femme séparée de biens—Marchande publique—Autorisation—Exception à la forme.—*Jugé*, Que la femme séparée de biens et marchande publique peut poursuivre en dommages pour des faits relatifs à son commerce sans être autorisée par son mari ou par le juge.—*Methot et al. v. Dunn.*

Compensation—Drafts received before insolvency.—*Held*—1. Where one bank, creditor of another bank for the amount of a note discounted for it, received from the bank indebted to it (then solvent) sundry drafts for collection: that compensation took place in favor of the creditor from the moment of delivery of the drafts, and therefore the latter was not bound to bring back to the estate what it received on account of the drafts after the insolvency of the debtor bank.

2. That compensation did not take place in favor of the creditor for the amount of a draft received from the debtor bank within 30 days before the commencement of the winding-up order.—*Exchange Bank of Canada v. Canadian Bank of Commerce.*

Tutelle—Homologation—Age—Incapacité.—*Jugé*—1o. Que l'âge peut être une raison pour refuser la tutelle d'un mineur, mais n'est pas une cause d'exclusion.

2o. Que l'incapacité d'un homme, pour être une cause d'exclusion de tutelle, doit être telle qu'elle le rend inapte à conduire ses affaires et celles d'autrui.—*Lebeuf v. Daoust.*

Comparution—Signification d'icelle au de-

mandeur.—*Jugé*, Qu'une comparution dont le demandeur n'a pas reçu copie ou qui ne lui a pas été signifiée est irrégulière; et qu'il sera permis au demandeur sur motion de procéder par défaut, nonobstant la production d'une semblable comparution.—*Pipe v. Orevier.*

Chèque—Acceptation—Gérant de banque.—*Jugé*, Qu'en loi et suivant les usages du commerce, l'acceptation d'un chèque ou d'un autre effet de commerce par un gérant de banque, avec la condition d'en effectuer le paiement à une date subséquente, est légale et dans les limites des pouvoirs d'un tel gérant.—*La Banque du Peuple v. La Banque d'Échange.*

Saisie-arrest—Distraction de frais.—*Jugé.*—Que la distraction des frais en faveur des procureurs n'empêche pas la partie qu'ils représentent d'être créancière de la partie condamnée aux dépens, et d'agir contre cette dernière si les procureurs ne le font pas, surtout lorsque ceux-ci ont été préalablement payés par le créancier.—*Bissonette v. Dunn, et McDonald, T.S.*

Douaire—Cession—Cessionnaire en cause—Suspension des procédés.—*Jugé*, Que lorsqu'il appert au dossier que le demandeur a cédé ses droits et n'est que le prête-nom du cessionnaire, le défendeur pourra sur motion faire suspendre tous les procédés jusqu'à ce que le cessionnaire, véritable demandeur, ait été mis en cause.—*Bondy v. Valois et al.*

Cour du Recorder—Défense en droit—Certiorari.—*Jugé*, Qu'un jugement rendu par la Cour du Recorder renvoyant une défense en droit n'est pas susceptible d'appel par *Certiorari.*—*Beaudry v. La Cité de Montreal.*

Dette de la communauté—Usufruitier—Capitiaux—Entretien et éducation—Compensation.—*Jugé*—1o. Que le légataire ou donataire universel en usufruit est tenu personnellement, vis-à-vis des créanciers, des dettes de la succession, même des capitiaux, et que la contribution aux dites dettes par les nu-propriétaires dans les proportions fixées par la loi, doit être établie entre eux et l'usufruitier, ne

regarde pas les créanciers et n'empêche pas leur recours.

20. Que le père est tenu en loi à l'entretien et à l'éducation de son enfant, et que ni lui, ni ses représentants ne peuvent opposer les dépenses faites pour ces objets, en compensation à une dette légitimement due à l'enfant.
—*Boileau v. Secrs.*

COUR DE CASSATION (FRANCE).

PARIS, mars 1885.

DÉNAÏDE V. LES CHEMINS DE FER DE L'ÉTAT.

Transport de marchandises—Itinéraire—Tarif.

Jugé.—Qu'une compagnie de chemin de fer qui recoit mandat de transporter des marchandises sans que l'expéditeur désigne l'itinéraire à suivre, doit, en principe, les transporter par la voie la plus courte. Il y a pourtant exception dans le cas où l'expéditeur a requis l'application d'un tarif spécial déterminé, ou d'un tarif commun ou même encore celle du tarif le plus réduit, si cette réquisition implique l'emploi d'un itinéraire plus long quoique moins coûteux. Toutefois cette exception elle-même doit se restreindre à de justes limites. Ainsi, elle s'appliquera incontestablement, si la compagnie expéditive, possédant plusieurs tarifs spéciaux plus ou moins réduits avec des itinéraires différents, le transport doit s'effectuer uniquement sur son propre réseau ;

Elle s'appliquera encore en cas de désignation précise d'un tarif commun, entre la compagnie, qui commence le transport, et celle qui doit le continuer ; mais si la marchandise doit emprunter des réseaux de deux ou plusieurs compagnies et que l'expéditeur se borne à requérir l'application du tarif le plus réduit, on ne saurait exiger de la première compagnie, qu'elle recherche parmi les tarifs étrangers à son propre réseau, celui qui procurerait le plus d'économie à l'expéditeur même au prix des lenteurs d'un parcours plus ou moins allongé. C'est, en ce cas, à l'expéditeur lui-même de faire cette recherche et de désigner l'itinéraire qu'il croit devoir être le plus profitable. S'il ne l'a fait, et que la marchandise ait suivi la voie la plus directe, il ne saurait s'en plaindre comme d'une faute de la compagnie ou d'une infrac-

tion aux conditions de la lettre de voiture.
(*Rapport de Maître Albert : Chambre Civile de la Cour de Cassation. Journal de Paris.*)
(J.J.B.)

THE INDORSEMENT OF BILLS OF LADING AS SECURITY.

The decision of the House of Lords in the case of *Burdick v. Sewell*, 54 Law J. Rep. Q.B. 156, reported in the March number of the Law Journal Reports, puts an end once for all to a discussion which has divided the judges. Mr. Justice Field, at the trial of the action, in an elaborate judgment, held that a person with whom a bill of lading indorsed in blank had been deposited by way of securing an advance was not an 'indorsee to whom the property passed,' that the right of suit and liabilities arising out of the contract were not, under the Bills of Lading Act, 1855, s. 1, vested in him, and that, therefore, he was not liable to the shipowner for the freight. In the Court of Appeal, Lord Justice Bowen agreed with this decision, but the Master of the Rolls and Lord Justice Baggallay dissented from it. The House of Lords consisting of the Lord Chancellor, Lords Blackburn, Bramwell and Fitzgerald, were unanimous in favour of revising the decision of the majority of the Court of Appeal. The decision is, no doubt, in favour of facility in obtaining advances upon the security of bills of lading, as it relieves those who make the advance from the immediate danger of finding themselves with a liability on their hands instead of a security. In this sense it facilitates business, but it must not be taken to have finally disposed of all the questions which may arise. For example, can the depositor of bills under these circumstances give a good title to a purchaser without the concurrence of the depositor and indorser, and has the depositor an insurable interest, to the full amount of the value of the goods? These are questions which may give rise to some litigation in the future.

After the full and minute judgments of the Lord Chancellor and Lord Blackburn, the searching verbal criticism of the section by Lord Bramwell and the unanimous decision of the House of Lords, the only doubt which

lingers in the minds of lawyers arises from the fact of the difference of opinion expressed by the Master of the Rolls, whose opinion on questions of mercantile law, from his vast familiarity with the subject and his great business capacity, is of the greatest weight. The Master of the Rolls in the Court of Appeal did not rest his judgment on any verbal criticism of the section like the difference between 'a property' and 'the property' which commended itself to Lord Bramwell and Lord Justice Bowen, or upon any analysis of the decisions such as that which the Lord Chancellor and Lord Blackburn applied to the case. Still less was there good foundation for Lord Bramwell's surprise 'at the contention of the Master of the Rolls, as he has always so ably and powerfully contended that mercantile laws, contracts, and usages should be as free as possible from technicality.' It would not be very difficult to show that the opinion of the Master of the Rolls was due to this feeling, but that the decision of the House of Lords has the effect, to some extent at least, of introducing technicality. The view adopted by the Master of the Rolls had, at all events, its own simplicity. It gave the indorsee of a bill of lading a clear position, and enabled him, if necessary, to pass on a good title to a third person, and prevented the necessity of any inquiry being made upon the transfer of a bill of lading, whether the transferor had bought the goods or had only lent money on them. It may be that the balance of convenience lies in favour of the decision of the House of Lords, but more confidence would be felt in this decision if it had more fully dealt with the inconveniences pointed out by the Master of the Rolls. In fact, the reader will rise from the perusal of the opinions delivered with somewhat vague notions as to the precise position of the deposittee. Mr. Justice Field and Lord Justice Bowen were of opinion that he is a pledgee, and Lord Blackburn, Lord Bramwell, and Lord Fitzgerald seem to adopt this view. The Lord Chancellor, however, makes him a pledgee and something more. He says that 'the indorsee, by way of security, although not having the property passed to him absolutely by the indorsement and delivery of the bill of lading

when the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit.' If so, is he not rather a mortgagee with power to take possession than a pledgee?

It may well be that the weight of the inconveniences to the indorsee by way of security arising from the anomalous position now given him is less than the obstruction to business which would arise by making him liable to pay freight, because the position is generally quiescent. He has the bills of lading, and he has the insurance on the goods, and if the ship goes to the bottom he obtains the amount of his advance from the insurers. If the ship and goods arrive safely, the borrower in ordinary course redeems the bill of lading and deals with the goods as he pleases. Suppose, however, the value of the goods has gone down below the sum advanced, and the borrower leaves the lender to do as he pleases, and will not help. Then, if the Lord Chancellor be right, he can convert himself into full proprietor; but if it be true that he is a pledgee he can give no title, and has no power of sale, at all events without applying to a Court of law. The decision, therefore, is not in all its aspects favourable to the lender. Perhaps the inconvenience which may arise is a small matter not of frequent occurrence, but it would be as well if the House of Lords had more fully considered its bearing in the interpretation of the section.—*Law Journal* (London.)

RECENT ONTARIO DECISIONS.

Patent of Invention—35 Vict. (Can.), C. 26—*Delivery of Model*.—*Held*, that 35 Vict. (Can.), ch. 26, does not require delivery of a model prior to the issue of a patent of invention. In this case, after the granting of the patent, the commissioner wrote to the applicant that the patent had been granted, and that it would be forwarded on receipt of the model, which was sent, and the patent was then forwarded. *Seem*, that delivery of the model prior to the grant of the patent was dispensed with, merely requiring it to be sent before the patent could be forwarded.—*Regina v. Smith*, Queen's Bench Division.—21 C.L.J.

The Legal News.

VOL. VIII.

MAY 2, 1885.

No. 18.

Lord Bramwell, in England, like Archbishop Lynch, of Toronto, does not believe that people can be kept sober by Act of Parliament. His Lordship has published a little pamphlet on "Drink," in which he gives a negative reply to the question, "Can nothing be done by law to diminish the mischief caused by drink?" The *Law Journal*, noticing the treatise, says: "A judge of his experience of course fully appreciates the mischief of drunkenness; but weighing the pleasures of drink against the dangers of its excessive use, he finds the balance on the side of drink. The pamphlet is an outspoken expression of the opinion held by most people of sense. The sale of drink may fairly be regulated for the prevention of nuisances and the maintenance of order; but to prohibit it is a sumptuary law, and contrary to all principle in legislation."

Minnesota is another State which has been disappointed at the result of ceasing to hang murderers, and it has therefore recently restored the death penalty. One of the advantages expected from the abolition of capital punishment was that juries would be more ready to convict, if their verdict did not involve the death of the criminal. But this expectation has not been fulfilled, and if any one supposed that juries would convict where a reasonable doubt existed, it is quite proper that the expectation should be disappointed, however light the punishment. The *Boston Advertiser* remarks that the same result is seen in every jurisdiction which has abolished the death penalty. "The jury, which before faltered in its duty of imposing the extreme penalty, falters still. Justice continues feeble, criminals find themselves but half punished, either through short sentences or early pardons, and society, seeing the results, applauds lynching, and calls for a restoration of the gallows."

In our provincial court of appeal the proportion of reversals is about one in four. In England it is rather more. For example during the late sittings there have been 58 reversals to 130 confirmations. The proportion varies considerably for the several judges. Baron Huddleston has made the best score, being affirmed nine times and only once over-ruled. On the other hand one of the Queen's Bench judges has been over-ruled four times and only twice sustained. One of the Chancery judges has been sustained fourteen times and over-ruled only three times, while another who has been sustained in an equal number of decisions has been over-ruled eight times.

LORD CAIRNS.

The death of Lord Cairns, who was the greatest of living English lawyers, at an early age compared with the average years of successful publicmen, is the last evidence of the physical weakness with which his career was weighted throughout. If he had lived, he would probably never again have taken his seat on the woolsack. Deafness, arising from "ivory in the ear," had of late years been added to the infirmity of the chest from which he suffered all his life. Upon the last occasion on which he sat in the House of Lords for the purpose of taking part in the rehearing of an appeal which, on the original hearing, had equally divided the law lords, he found it necessary to sit close to the bar of the House, and even in that position was obliged to ask the counsel being heard to raise his voice. At one period of his life Lord Cairns was practically kept alive by breathing inhalations prescribed for him by a well-known specialist in asthmatic disorders. His health, therefore, was a sufficient explanation of the intervals between his public appearances, and of the comparative rarity with which his name appears in the "Reports" for the nineteen years during which he was in a judicial capacity. It was only with great care that he was fit for his duties at all, although he was at no time at all like an invalid either in appearance or in habits. During a large part of his practice at the bar he invariably refused briefs for Saturday, and on that day gave himself a

holiday, which he usually spent in the hunting-field. The long vacation generally found him on the moors of Scotland. After his elevation to the bench it was again in the interest of his health that he took up his residence at Bournemouth, and it is well known that the same consideration made it necessary for him to resign the Conservative leadership in the House of Lords. As a compensation for this lifelong drawback his powers matured quickly and his opportunities came early. He was a Queen's Counsel at the age of thirty-seven, and Her Majesty's Solicitor-General before he was forty.

The place which history will assign to Lord Cairns will probably be that of the greatest lawyer on the English bench of his generation. The late Mr. Benjamin, whose capacity for passing a judgment and impartiality in the matter will not be questioned, pronounced Lord Cairns the greatest lawyer before whom he had ever argued a case, and Lord Bramwell is known to have a very high estimate of his powers. The attribute in which Lord Cairns excelled was lucidity. The most complex legal problem presented no difficulty to him, and it passed out of his hands placed by his mere statement in so simple and clear a light that the wonder was why there could ever have been any difficulty about it. Readers of his judgments are like those who look for the first time on a simple mechanical contrivance producing great results :—

The invention all admire, and each, how he
To be the inventor missed ; so easy it seemed
Once found, which yet unfound most would have
thought

Impossible.

Lord Cairns made no display of a depth of reading like that of a Willes or a Blackburn, although he was far from deficient in learning. Case-law a man of his powers could afford to despise, and even when at the bar he was in the habit of citing no cases until he had exhausted the principles of the argument, when he would mention the names of the authorities illustrating his proposition. Much of the logical precision which distinguished him in the statement of legal propositions was due to the fact that, in the chambers of the late Mr. Thomas Chitty, at

1 King's Bench Walk, he was well grounded in the practice of common law pleading, a training of which students at the present day are unfortunately deprived. Lord Cairns on the bench was not like the late Sir George Jessel, fond of bringing his own individuality to the front, or of exposing in his judgments the processes by which he arrived at them. In delivering judgment, he was like an embodiment of the voice of the law, cold and impersonal, and suggested an intellectual machine upon which no sophism could make any impression, and which stamped the seal of the law upon what was obviously reasonable and just. Perhaps Lord Westbury was his equal in penetration and in clearness of expression ; but either from his matter or his manner he did not carry the same inexorable conviction. An example of the high estimate he had of the dignity of judicial proceedings was supplied at the time of the addition of the lords of appeal to the House of Lords. One of the new lords of appeal had acquired in a Court, in which speed was considered rather than orderliness, the habit of interrupting the arguments by questions in the nature of "posers." On his reverting to this habit in the House of Lords, Lord Cairns interposed from the woolsack before the question could be answered, with the words : "I think the House is desirous of hearing the argument of counsel and not of putting questions to him." The interposition was made by Lord Cairns in a voice not musical, like that of the late Chief Justice Cockburn, but possessing with his the quality that it could not be gainsaid. Lord Cairns is said to have had no humour, but it was rather that he did not show it on the bench, where he considered it out of place. On occasion he could use all the weapons of rhetoric in Parliament, and when anything occurred to melt his cold, impassive exterior, he showed that the true fire of the orator was within him, but usually repressed. It is remarkable, but not unprecedented, that a man who succeeded so admirably as a speaker should have begun with a constitutional diffidence. So impressed was he with his deficiency in nerve, that at the beginning of his career at Lincoln's Inn he considered himself fit only for chamber practice, and actually for some

time confined himself to conveyancing. The late Vice-Chancellor Malins, in whose chambers he read, and who is said never to have quite forgiven his pupil for not making him a Lord Justice, probably disabused him of this want of confidence so far as to induce him to try his fortune at the bar. Certain it is that when he once had briefs he was never without them; for, as he himself described his early beginnings, he came from Trinity College to London without a friend. Mr. Gregory, of Bedford Row, gave him his first brief, and never afterwards deserted him. Lord Cairns was one of the few judges not being Chief Justices who have taken a peerage while on the bench; but even his success at the bar did not leave him rich enough to accept it, and he would have rejected it but for the fact that a rich relative came forward and endowed his peerage for him.

Lord Cairns cannot be said to have been a popular Lord Chancellor. His manner was not sympathetic, and he was a sincere professor of a gloomy religion which he introduced even into his social entertainments. Like Lord Hatherley and his political rival, Lord Selborne, he taught in the Sunday school. He interested himself in benevolent projects, and sometimes took the chair at Exeter Hall. Perhaps his good nature in these matters was unduly trespassed upon on one occasion when an enterprising promoter of a charity distributed circulars—particularly in the neighbourhood of Lincoln's Inn, the Temple and Bedford Row—with the Lord Chancellor's autograph on the corner of the envelope and his crest on the seal. The only weakness of which Lord Cairns has been accused was that he was "justly vain" of the spotlessness of his tie and bands in Court, and of the "nice conduct" of the flower in his button-hole, when in the attire, to use the words of his political chief, "which denotes festivity." During his first brief tenure of the woolsack in 1868 he appointed Vice-Chancellor Giffard, Mr. Justice Hayes, Mr. Justice Brett (now the Master of the Rolls), and Baron Cleasby as judges, the three last being created under a new Act, with a view to election petitions; and from 1874 to 1880 he appointed Mr. Justice Archibald, Mr. Justice Field, Mr. Justice (now Lord

Justice) Lindley, Baron Huddleston, Mr. Justice Manisty, Mr. Justice Hawkins, Mr. Justice Lopes, Mr. Justice (now Lord Justice) Fry, Mr. Justice Stephen, and Mr. Justice (now Lord Justice) Bowen. He also advised the Prime Minister in the appointment of Lords Justices Baggallay, Cotton, and Thesiger. In taking part in the appointment of the brilliant son of Lord Chelmsford, whose services were too soon lost to the bench, Lord Cairns was able to some extent to heal the resentment caused by his having supplanted Lord Chelmsford in 1868, when Disraeli succeeded Lord Derby as Prime Minister. Lord Chelmsford was then supposed to have said that he was dismissed in a manner in which a gentleman would not discharge his butler. *Punch* at the time endeavoured to soften the blow with the joke that Disraeli had erected Cairns over Lord Chelmsford in honour of the ex-Chancellor. The sacrifice made to obtain Lord Cairns' services shows how highly they were esteemed by Mr. Disraeli. In one important branch of the duties of a chancellor—namely, the choice of County Court judges—Lord Cairns hardly showed the same happy inspiration as his party leader in the choice of his subordinates. Some of these appointments were much criticised. Of those which were criticised it may be said of some at least that the result has not justified the criticism. In another important branch of the duties of a Chancellor Lord Cairns left his mark permanently on the legislation of the country. The only Act to which his name became actually attached was an Act allowing Chancery judges to give damages in lieu of an injunction or specific performance, which has met the fate of repeal by a Statute Law Revision Act. On a small scale it anticipated the Judicature Acts, a series of statutes in which Lord Cairns had a very great share, having been chairman of the Judicature Commission, which reported in 1869, and Chancellor when the Acts first came into operation. The chief point in the Judicature Acts in which his influence was felt was the restoration of the House of Lords as the final Court of Appeal, from which position it had been displaced by Lord Selborne's Judicature Act of 1873. In making this alteration Lord Cairns forgot to alter Lord

Selborne's nomenclature, so that we have a Supreme Court of Judicature which is not supreme, and a Court of Appeal which has another Appeal Court over it. Towards the close of his career Lord Cairns returned to his first love, conveyancing, and passed through the House of Lords the Conveyancing Acts of 1881 and 1882, and the Settled Land Act of 1882, measures which in part he attempted to introduce in the House of Commons as early as 1858. When Lord Cairns first became Chancellor in 1868, there were no less than five ex-Chancellors—namely, Lord Brougham, Lord St. Leonards, Lord Cranworth, Lord Westbury, and Lord Chelmsford, although Lord Brougham and Lord Cranworth died in that year. It happens by his death there is not now one ex-Chancellor, so that the necessity for the re-arrangement of the House of Lords as an appellate Court by the creation of lords of appeal which he carried out is now fully apparent and will be fully tested. Probably Lord Cairns will be missed in public life more by Lord Selborne than by anyone else. Frequently opposed at the bar, and in Parliament, associated together on the Judicature Commission and in other consultations for the reform of the law, and both men of earnest purpose, each had that perfect confidence in the other which is desirable between political opponents in the public interest. The public loss is very great, because at the moment, among the lawyers of his party it is not easy to point out a worthy successor.—*Law Journal* (London).

CUSHING & DUPUY.

Cushing & Dupuy has become a leading case on the important question of transfer of moveable property by way of security, without delivery or displacement, and is frequently cited. In the report of the judgment of the Court of Queen's Bench, Montreal, 22 L.C.J., pp. 201-210, the opinion of Mr. Justice Cross, concurring in the judgment, is omitted. In view of the importance of the case we think this opinion should be preserved, and we extract it from the record containing the certified copy transmitted to the Privy Council. The decision of the Judicial Committee, confirming the judgment of the ma-

jority of the Queen's Bench, will be found in 3 Legal News, p. 171, and 24 L. C. J. 151.

CROSS, J. By Notarial Deed, dated 14th March, 1877, McLeod, McNaughton & Léveillé, brewers, at Montreal, sold to the Respondent, Cushing, who is a notary of the same place, the brewery utensils contained within their manufactory, of which utensils a description is given in the Deed: some of them are valued to the amount of \$4,890, others are described without being valued.

The instrument declares the sale to have been made for the consideration of \$1, and for other good and valuable considerations acknowledged to have been received; and further, on condition that Cushing would endorse bills for the sellers to the extent of \$2,000, including those already endorsed.

By another notarial *acte*, executed on the same day, Cushing leased the same effects to the sellers, for a period of three years, at a rental of \$100 per annum. There was no delivery or displacement of the effects; the vendors remained in possession until the 19th of July following, when the Appellant possessed himself thereof, as official assignee, in virtue of a writ of attachment sued out against McLeod, Léveillé & McNaughton, under the Insolvent Act of 1875.

Cushing, the Respondent, claimed the effects in question from the Appellant, the Assignee, and to this end presented a Petition to a Judge of the Superior Court, acting for Insolvent cases, basing his claim upon the Deed entitled "Deed of Sale," above mentioned.

The Appellant, in his quality of Assignee, contested this claim on various grounds, in substance as follows:—

1st. Because the *acte* of the 14th March, 1877, although entitled a Deed of Sale, was not in fact a sale, but, on the contrary, was in the nature of a giving in pledge of the effects in question, and was inoperative as a pledge, for want of possession in the pledgee.

2nd. There had been no displacement or delivery of the effects.

3rd. McLeod, McNaughton & Léveillé were insolvent at the time the Deed was executed,

and the conveyance was made by them in fraud of their creditors.

The Judge of the Court below, maintained the Petition, and awarded the utensils to the Petitioner, now Respondent, and from this judgment the present appeal has been taken by Dupuy, the Assignee.

I am disposed to take a different view of the case, from that of the learned Judge of the Court below.

Under the law and practice of our courts, as it prevailed before the Civil Code was enacted, it will be conceded that no such title as that relied on by the Respondent would have prevailed against a seizure of the utensils in question, in the possession of McLeod, McNaughton & Léveillé; I do not see that the Code has so changed the law as to render such a title now efficacious.

On the first objection to the title submitted by the Appellant; that the contract was one of pledge, and as such inefficacious for want of possession in the pledgee; take the definitions given in the Code, respectively of the Contract of sale, and the Contract of pledge:

By art. 1472, a sale is defined to be a contract by which one party gives a thing to the other for a price in money, which the latter obliges himself to pay for it. Of the three essentials; 1st, the thing; 2nd, the price; and 3rd, the consent; there is in this case wanting, the second, viz. the price. The only substantial consideration here enunciated, was that the transferee was to endorse the paper of the transferor, to the extent of \$2,000, for which he was to have put in his control utensils, part of which only were valued at \$4,880. The absence of a price divests the document of the character of a sale; and the endorsements to have been given as consideration, go to shew that the object of the conveyance was to secure Cushing against his endorsements; and if McLeod, McNaughton & Léveillé took up their paper, the effects conveyed would, as a consequence, revert to them. It would therefore seem that the contract was not one of sale but of pledge.

Art. 1866, of the Civil Code, defines a pledge to be a contract by which a thing is placed in the hands of a creditor, or, being

already in his possession, is retained by him, with the owner's consent, in security for his debt. The contract in question in this case, is evidently one of this description. It is a transfer of moveables, without a fixed price, but with the obligation on the part of the transferee, to endorse notes for the pretended vendors, against which the effects transferred would stand as a security.

By Art. 1970, the privilege subsists only while the thing pawned, remains in the hands of the creditor, or of the person appointed by the parties to hold it.

This is not new law, but on the contrary in accordance with the rules and principles of common application before the Code came into force. No maxim was more universally received, nor better understood, than that moveable or personal property could not be affected by *hypothèque—le meuble n'a pas de suite par hypothèque*. There were, of course, exceptions, of privilege, but these were special, and latterly a statutory exception in the case of warehouse receipts; the general principle was always recognized, and still remains the rule, notwithstanding any change of the law effected by the Code, so that to make a pledge effective, there has to be possession in the pledgee or his agent.

For want of possession in the pledgee, in the present case, the pledge was inefficacious.

It has been shown that the contract in question was not one of sale. But admit it to be so, for the sake of argument. Is the title of the Respondent good as a purchaser? The law formerly required a delivery, to vest the vendor's title in the purchaser: this is no more the case. Art. 1472 of the Civil Code declares a sale to be perfected by the consent alone of the parties, although the thing sold be not then delivered. By art. 1025—A contract for the alienation of a thing certain and determinate, makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made. Again, by art. 1027, the rule laid down by art. 1025, is made to apply as well to third parties as to the contracting parties, with the qualification that if a party obliges himself consecutively to two persons, to deliver to each of them a thing which is purely moveable property, that one of the

two who has been put in actual possession is preferred and remains owner of the thing although his title be posterior in date; provided, however, that his possession be in good faith.

The three articles last cited from the Code, have made a change in the law. Is the present case affected by that change?

Consent, without delivery, now passes title to moveables, even as regards third parties, with the qualification contained in art. 1027, that the posterior title with possession has priority over the earlier title. In the present case, the attachment under the Insolvent Act took the utensils in question in the hands and possession of the Insolvents McLeod, McNaughton & Léveillé, and transferred their title and possession to Dupuy the Assignee; the title was posterior in date to that of Cushing, but the possession with the title, vested the property in him, no previous delivery having taken place to Cushing. A leading maxim, always heretofore recognized in such cases, was that possession of moveables was a presumption of ownership. Bourjon and other authors treating of the subject say, that *en matière de meubles possession vaut titre de propriété*. This rule has not been reversed by the Code. It may be slightly modified, so as not to permit of a naked possession being allowed to prevail against a prior title in good faith. The possessor in such case may require to shew some title, although a posterior and, perhaps, sometimes even a weaker title may suffice.

Before the Civil Code came into force, it would not have been seriously contended that a title such as produced by the respondent, would have been maintained against an execution creditor of the vendors, or against an assignee to their insolvency. There is no sufficient reason why it should do so now.

Lastly—Was the respondent's title one in good faith? When the title is in good form, and unaccompanied by indications of fraud, publicity is the usual test of good faith in the purchaser, and the ordinary way in which it is proclaimed, is by open and public possession. There are indications in this

case, from which legal fraud might be inferred. The effects conveyed were the implements, without which the business of McLeod, McNaughton & Léveillé could not be carried on; the purchaser was not a trader or dealer in such articles, but on the contrary was a professional man, who as a mere money lender, would be unlikely without motive to lend himself to such a transaction, and accept what, to all appearance, was a very equivocal security, considering that the actual possession remained as before; publicity is also wanting. These are sufficient grounds from which to draw the inference of legal fraud. See Bourjon edn. of 1770, vol. 1, p. 145, tit. 1, *Des biens considérés en général*, Cap. 6, Sec. 1, No. 1. "En matière de meubles la possession vaut titre de propriété, la sûreté du commerce l'exige ainsi: la base de cette maxime est qu'on ne possède ordinairement que les meubles dont on est propriétaire, ainsi la possession doit donc quant à ceci, décider; c'est le meilleur guide, et quel autre pourrait-on prendre sans tomber dans la confusion." I understand that the rule now recognized by the Code, to the effect that the property passes by the consent of the parties in a transaction, in its nature translatif of property, although no actual delivery has taken place, is in accordance with the law of England, yet there, I feel confident, that such a transaction as the one now in question, would not be sustained against an Assignee in bankruptcy, or an execution creditor. See the remarks in Benjamin on Sales, pages from 390 to 397; and in our law it would not admit of a doubt, unless the Civil Code has changed it much more than I apprehend it has. See the 2nd volume of Bourjon of the edition already cited, p. 692, tit. 8, *Des Exécutions*, cap. 3, sec. 1; No. 1. "Après avoir expliqué les privilèges sur les meubles, voyons les revendications autorisées d'eux. Le principe fondamental de cette matière est, que par rapport aux meubles, la possession d'eux vaut titre de propriété; ainsi le déplacement y est bien important. De là il s'ensuit que chacun est présumé propriétaire des meubles qu'il possède, et que, par conséquent, ils peuvent être valablement saisis et exécutés sur celui qui les possède; première

conséquence qui résulte du principe général qu'on vient de poser.

No. 2. Du même principe, il s'ensuit qu'un contrat de vente, quoiqu'authentique, mais sans déplacement des meubles, est insuffisant pour fonder en faveur de l'acheteur une demande en revendication, et que la saisie sur le vendeur de tels meubles, quoique vendus par le possesseur, mais sans déplacement, est bonne, encore que le contrat de vente soit antérieur à icelle; seconde conséquence qui naît du même principe. En effet, cessant cette juste rigueur, les débiteurs mal intentionnés seraient maîtres de mettre leurs meubles à couvert de la poursuite de leurs créanciers. Il faut donc conclure, de là, qu'on ne peut avoir égard à une vente de meubles, quoique justifiée par un titre, lorsque cette vente n'a pas été consommée par le déplacement et l'enlèvement d'iceux."

The decisions of our Courts have hitherto been in accordance with these principles, and I find no sufficient reason for concluding that the Code has made any such change as would render them inapplicable in the present case.

The presumption of ownership by possession under the old law could rarely be rebutted by any title whatsoever. If the Code has operated any change in this respect, it is only to the extent of requiring the possessor to oppose some kind of title not in its nature vicious, as, for instance, a posterior title combined with his possession, against the previous title unaccompanied by possession. In this case the Assignee has a sufficient title by the attachment in insolvency.

Were the law to be construed otherwise, facilities to fraud would be enormous. Traders, who, to all appearance, were sufficiently well stocked, to afford a guarantee to confiding creditors, would suddenly be found to possess nothing of their own, when their estates came to be realized in the hands of official assignees, to whom they had passed in consequence of financial embarrassments. Their property would be found to have been all alienated by previous secret transactions, whereof their furnishers would have had no notice. The apparent wealth of such traders would have operated as a delusion and a snare to defraud confiding parties. For these

reasons, I am of opinion that the judgment of the Court below should be reversed and the respondent's petition dismissed with costs.

COUR DE CIRCUIT.

MONTREAL, 30 avril 1884.

Coram LORANGER, J.

HENRI JULIEN V. PREVOST & ST. JULIEN.

Avocats pratiquant ensemble — Solidarité — Argent collecté de-qualité — Mandat.

JUGÉ:— *Que deux avocats qui pratiquent leur profession en société sont conjointement et solidairement responsables vis-à-vis un client qu'ils ont représenté ad litem, et pour le compte duquel un des associés a collecté de l'argent, quand même cet argent aurait été reçu après la reddition du jugement dans la cause où ils occupaient.*

PER CURIAM. Les défendeurs pratiquent la profession d'avocat en société. Ils furent employés par le demandeur dans une action de la Cour de Circuit sur billet et obtinrent pour lui un jugement de cette cour. Par une exécution de bonis et une vente judiciaire, ils percurent pour le compte du demandeur une certaine somme d'argent. Le bref d'exécution avait été émané sur un *fiat* signé de "Prevost et St. Julien, avocats du demandeur."

Le demandeur les poursuit maintenant tous deux conjointement et solidairement pour recouvrer l'argent ainsi collecté qu'il prétend ne pas lui avoir été remis.

Les défendeurs plaident séparément. Maître St. Julien, qui a reçu l'argent et donné un reçu au nom de la société, répond qu'il a remis au demandeur tout l'argent qu'il avait collecté pour lui et qu'il ne lui doit plus rien; Maître Prevost plaide qu'il n'a eu aucune connaissance des faits et qu'il n'est pas responsable; qu'il n'était que procureur *ad litem* du demandeur et que son mandat avait cessé au jugement; que la société qui existait entre lui et St. Julien n'avait pour objet que la pratique de sa profession, n'était pas commerciale et n'engageait pas sa responsabilité; que son dit associé n'avait pas d'autorité pour recevoir le montant en question et donner un reçu au nom de la société.

Il est admis que les associés sont respon-

sables solidairement pour l'argent reçu par la société. La question a été le sujet d'une longue controverse, mais la Cour d'Appel l'a décidée dans la cause de *Bergevin v. Ouimet*, (22 L. C. J. 285) et cette décision est devenue la jurisprudence. On a prétendu que cette cause ne s'appliquait pas. J'ai lu les factums, et je trouve que le principe décidé dans la cause de *Bergevin* s'applique à la présente cause. Le vice-chancelier Wood, dans la cause de *Plumer v. Gregory*, rapportée à la page 631 du 18e volume des "*Law Reports, Equity cases*," dit clairement: "*Each partner is the agent of the other and bound by his acts and representations.*" L'article 712 du Code Civil dit: "Lorsqu'il y a plusieurs mandataires établis ensemble pour la même affaire, ils sont responsables solidairement des actes d'administration les uns des autres, à moins d'une stipulation contraire."

L'exécution en cette cause a été émanée sur le *fiat* des défendeurs et c'est en vertu de cette exécution que la vente judiciaire a eu lieu et que les défendeurs ont reçu l'argent pour le bénéfice du demandeur; par conséquent, ils ne sont pas fondés de prétendre que leur mandat a cessé lors du jugement.

Je suis d'opinion qu'il y a solidarité entre les défendeurs et qu'ils sont ainsi tenu de remettre au demandeur ce qu'ils ont collecté pour lui. Le défendeur St. Julien a prouvé son plaidoyer jusqu'au montant de \$18, ce qui réduit d'autant le montant que les défendeurs sont condamnés de payer au demandeur."

Jugement contre les défendeurs conjointement et solidairement pour \$19 avec dépens.

M. J. C. Larivière, avocat du demandeur.

Prévost & Turgeon, avocats du défendeur Prévost.

Champagne & St. Julien, avocats du défendeur St. Julien.

(J. J. B.)

RECENT ONTARIO DECISIONS.

Criminal law—Conspiracy to bribe Members of Parliament—Pleading.—On demurrer to an indictment for conspiracy to bring about a change in the Government of the Province of Ontario, by bribing members of the legislature to vote against the Government. *Held*,

1. That an indictable offence was disclosed; that a conspiracy to bribe members of parliament is a misdemeanour at common law, and as such indictable. 2. That the jurisdiction given to the legislature by R. S. O., ch. 12, secs. 45, 46, 47, 48, to punish as for a contempt, does not oust the jurisdiction of the Courts, where the offence is of a criminal character, but that the same act may be in one aspect a contempt of the legislature, and in another aspect a misdemeanour. 3. That the Legislative Assembly has no criminal jurisdiction, and hence no jurisdiction over the matter considered as a criminal offence. 4. That the indictment, considered as a pleading, sufficiently stated the offence intended to be charged.

Per O'Connor, J. (diss.) 1. That the bribery of a member of parliament, in a matter concerning parliament or parliamentary business, is not an indictable offence at common law, and has not been made so by any statute. 2. That in all matters and offences done in contravention of the law and constitution of parliament, with the exception of treason, felony and breaches of the peace, parliament alone has jurisdiction, and the ordinary courts, civil and criminal, have no jurisdiction. 3. That the *lex et consuetudo parliamenti* reserves to the high court of parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members and its business, with the above three exceptions. *Regina v. Bunting et al.*, Queen's Bench Division.—21 C. L. J.

In the United States Circuit Court yesterday afternoon, Stephen G. Russell was convicted of counterfeiting in gilding English silver coins. This case is of interest to silversmiths and gilders, it being the first time that a criminal prosecution has been made for gilding. The defendant claimed that he gilded the shillings with no criminal intent and not with the purpose to defraud any one, but did it for his customers in the prosecution of his business. Judge Webb, in his instructions to the jury, said that the intent with which the defendant gilded these coins was immaterial to make it a crime; that Congress had passed a law making counterfeiting a crime, and if the jury found the defendant had gilded these coins, then the government had made out a case; that the act itself was a crime without any reference to the purpose for which it was done. The jury recommended the defendant to the mercy of the Court and no sentence will probably ever be imposed, as the government wished to make it a test case and serve as a warning to other gilders.—*Boston Law Record*.

The Legal News.

VOL. VIII. MAY 9, 1885. No. 19.

The beauties of the elective system are well illustrated in the failure of Mr. Justice Cooley to obtain re-election to the supreme bench of his own state. Mr. Cooley has attained international fame as one of the ablest writers of his generation. He has, moreover, occupied with credit a seat upon the supreme bench of Michigan for twenty years past; yet being compelled to seek re-election, he has been defeated by a man unknown beyond the limits of the state. This defeat, though humiliating to the country, will not, we are happy to learn, work to the disadvantage of the learned author. The *Central Law Journal* says: "He will be able as a chamber counsellor to take, in a single fee, as much as the State of Michigan paid him for two years of toil upon her bench of last resort. He will have, and will no doubt improve, the opportunity of devoting the leisure of his ripe years to the literature of the law; and we may expect from this circumstance results as beneficial to American jurisprudence as those which flowed from the narrow policy of the former Constitution of New York, which retired Chancellor Kent from the bench at the age of sixty."

A singular case of undue influence has been mooted in Kansas. At a recent trial, when the jury retired for deliberation, one of the number proposed to open their deliberations with prayer, and thereupon proceeded to pray "long and loud." What the tenor of the appeal was, whether it was impartial or favorable to either side, does not appear. The verdict, however, was against the defendant, and now his lawyer moves to set it aside on the ground of "undue influence exercised by one of the jurymen by means of public prayer in the jury room." The counsel, in his brief before the Kansas Supreme Court, admits that there can be no legal objection to "a private petition to the throne of grace

earnestly offered by a conscientious juror with the motive of freeing his own mind from prejudice and passion." But "a public prayer in such a place" presents a different case, since "one long practised in the wielding of this subtle influence can play upon the feelings and judgment of his weaker brother. And the more gifted in prayer is the leader the more powerful will be his influence."

Rigid Sabbatarian notions still prevail in some parts of New England. In a late case (*Barker v. City of Worcester*), a man who had sustained injuries by an obstruction in the highway, and who sued for damages, was met by the plea, "You were travelling on the Lord's Day, and under the statute you have no right to recover." It appeared that the plaintiff had been making a social call at the house of a friend, and was returning home when he slipped on an accumulation of ice, and broke his leg. The judge at the trial ruled that the plaintiff was "travelling" on the Lord's Day in violation of the statute, and was, therefore, not entitled to recover. The Supreme Judicial Court of Massachusetts, however, has corrected this peculiar ruling, and holds that a person who walks out on a Sunday, and calls at the house of a friend, is not "travelling," and is not precluded from the ordinary remedy of those who are injured by the carelessness of other people.

It is not often you find a person making so frank an admission of the arts by which he achieved success as a "Successful Solicitor" makes in a treatise put forth in England under the title, "How I became a Successful Solicitor." The writer states that the method adopted was that of self-effacement and obedience to the County Court judge before whom he practised. "The whole secret of my success," he says, "consisted in perceiving that it was the judge's desire to rule with undivided sway and above all competition in his domain; and by allowing him to be from the beginning to the end everybody in the case, and by effacing myself as much as possible, I obtained that indulgence and favour which procured me a large practice." The writer concludes his instructive article in the following manner: "It was by means of

the tact with which I conducted, or rather *carefully neglected to conduct*, these little cases through, and humoured the great man whilst dispensing his infallible judgments in that place, that I became a successful solicitor." There is nothing new under the sun, nor is this method of success novel. Just some such successful gentleman had Juvenal in his eye when he wrote :

— Rides? Majore cachinno

Concutitur : flet, si lacrimas adspexit amici :

Nec dolet. Igniculum brumae si tempore poseas,

Accipit endromidem : si dixeris, aestuo ! sudat.

Shakspeare has translated this in *Hamlet* :

Ham.—Your bonnet to its right use, 'tis for the head.

Ger.—I thank your lordship, 'tis very hot.

Ham.—No, believe me, 'tis very cold ; the wind is northerly.

Ger.—It is indifferent cold, my lord, indeed.

Ham.—But yet, methinks, it is very sultry and hot for my complexion.

Ger.—Exceedingly, my lord ; it is very sultry, as it were : I can't tell how.

A "Successful Solicitor" has also read Terence to some purpose :—

Est genus hominum, qui esse primos se omnium rerum volunt,

Nec sunt : hos consector.

Quidquid dicunt, laudo : id rursum si negant, laudo id quoque :

Negat quis ? nego : ait ? aio : postremo, imperavi egomet mihi

Omnia assentari : is quæstus nunc est multo uberimus.

THE CASE OF MR. DE SOUZA.

To the Editor of the LEGAL NEWS :

SIR,—Owing to the unfairness of most of the reports of my case in the Ontario press, I am constrained, in the interest of the public, to appeal to your columns.

The Law Society of Upper Canada in the year 1882, for reasons which, in compassion to that body, I will now pass by, made an ordinance to exclude English barristers from practising in that province. Before taking this serious step they appointed a committee who enquired and reported (1) that it was in their power, and (2) that it was expedient.

When I arrived in Ontario I straightway applied to the Treasurer and other Benchers of the Society, who confronted me with this ordinance, and informed me that whatever right I might have formerly enjoyed, was now abolished. Thus the deviation from precedent

originated not with me but with the Law Society.

Examining for myself into the question I found that the Society had erred in their estimate of their powers, and that the ordinance passed with so much affectation of pomp was ineffectual and void. It is sufficient merely to add that my view has since been confirmed by the recent statute of this year.

But, under such circumstances, I determined to disregard the Law Society and proceed upon the right which I possessed under the ancient statutes, and which has never been taken away.* The Benchers then offered privately to make an exception in my favour ; but I declined the insidious proposal, the acceptance of which would have stultified me and also ratified the ordinance, which they could no longer support.

And yet it was these very Benchers who deliberately, in my hearing and in open court, instructed counsel to assert that I was attempting an unnecessary deviation from usage ; and that they had never endeavoured to make rules to exclude me ! A trace of this statement appears in the resolutions of the judges, although the contrary fact was given in proof, and was common knowledge in the profession during three years past.

I went into the Court of Appeal on the 18th of March, in the form suggested by that very Court on the 3rd. I claimed to move, as of counsel for A. B., in a pending case, the court having acceded to the principle of the *Serjeants' Case*, that my right would be in issue. But on the 18th, to the surprise of all men, they declared that they were bound by the decision of the lower court, which on the former occasion they had not only disclaimed as of binding force, but had even admitted that they could not take cognizance of it. I pointed out that the resolution in question was not a matter of appeal, that they could not take notice of the reports in the newspapers, that it was impossible that my right, depending on a statute, could be conclusively decided by one court ; that they, too, were bound to discuss it, in duty to themselves who had taken the objection, as well as to the suitor who had instructed me, and was entitled to

* See argument in U. C. Law Journal, 15 Feb., 1885.

have justice, and on the broad ground of the independence of the Bar. They persisted in refusal and desired me to be seated; I asked them to record their decision, but they declined, and again ordered me to resume my seat.

On the 20th of April I rose in the same Court, as of counsel for C. D., on the ground that, there being nothing in the nature of a recorded decision against my right in that Court, I was compelled to act when instructed by a suitor, that the personal hostility of the judges could not exempt me from a clear duty, and that the original suggestion of the Court followed as yet by no discussion, justified me in this course. Again they refused: "You are attempting," they said, "to argue; but we will not hear any argument." *

I was of counsel next day for E. F., and justified my re-appearance by the same reasons of duty, there being nothing of record to disqualify me. My client was entitled to have his case heard, and he had chosen to retain my services. The judges grew intemperate, ordered me to sit down, asked me if I called myself a gentleman, and threatened to turn me out.

When, on the 22nd of April, I again claimed to move on behalf of G. H., the very first question put by the Court showed the propriety and correctness of my conduct. "Are you," they asked, "a member of the Bar of Ontario; are you a member of the Law Society?" "I am not," I replied, "a member of the Law Society; but my right depends on a statute which does not require that of me." † Having deliberately invited this issue they brought into prominence their own inconsistency of referring to the decision of a court which at the outset they had admitted to be in its nature incognizable. This issue, then, they declined to try. Whether the Court be of appeal or of origin, is not to the purpose; it is included in the expression of the statute, "H.M. courts of law and equity." The judges again threatened me with violence from which I had expected that my gown, at least, would have protected me. My duty would not suffer me to obey their commands to be seated; and so, for the first time perhaps

that such an outrage has occurred, they ordered the Sheriff to turn me out by force.

I am not unmindful of the significance of the fact that on the morning of my third re-appearance, one of the Benchers of the Law Society—he who had been most conspicuous even to indecency in obstructing my claim—was closeted for a long time with the judges before they took their seats.

LOUIS DE SOUZA.

SUPREME COURT OF CANADA.

OTTAWA, Feb. 16. 1885.

Coram RITCHIE, C. J., STRONG, FOURNIER, HENRY and TASCHEREAU, JJ.

BURLAND (plff below), Appellant, and MOFFATT (def. below), Respondent.

Assignee under voluntary assignment—Status.

Held, (reversing the judgment of the Court of Queen's Bench, Montreal, 7 L.N. 182) that an assignee holding property under a voluntary assignment made to him by an insolvent for the benefit of his creditors (parties to the deed of assignment), is not entitled to plead in his own name in reference to such property. Such an assignment merely entitles him to represent the assignor and to exercise the assignor's actions, and not those pertaining to the creditors alone.

The unanimous judgment of the Court reversed that pronounced by the Court of Queen's Bench, Montreal.

TASCHEREAU, J. This is an appeal from a judgment dismissing an action in revendication by which Burland, the appellant, claims certain machinery, which he contends the respondent Moffatt, detains illegally. Burland, in his declaration, alleges that he bought this machinery, by deed of the 12th May, 1881, from the Canada Paper Company, who had themselves bought it from Gebhardt & Co., by deed of the 27th April, 1880.

Moffatt answered this action by a plea alleging that he detains the said machinery under a voluntary assignment, of the 13th June, 1881, by the said Gebhardt & Co., of the whole of their estate, to him, Moffatt, for the benefit of their creditors; and that when Gebhardt & Co. sold it to the Canada Paper Company they were insolvent or embar-

* Report in *Globe*, 21st Apr.

† R.S.O. ch. 139.

rassed, the said sale having been collusively concerted in order to give to the said Company a fraudulent and illegal preference in fraud of the other creditors of the said Gebhardt & Co. The conclusions of this plea are that the said sale by Gebhardt & Co. to the Canada Paper Company, and the sale by the Canada Paper Company to the plaintiff, be declared to have been and to be simulated, fraudulent and inoperative, null and void, that the said deeds be rescinded and set aside, and the action in revendication of the said plaintiff dismissed. To this plea Burland replied that Moffatt had no legal status to oppose such objections to this action; that *Moffatt was not a creditor, and had no interest; that he could not plead defences that belonged only to the creditors*, and that he had no authority to represent the creditors, by pleading in his own name.

The Superior Court in Montreal, Rainville, J., dismissed Moffatt's plea, and maintained Burland's action, on three grounds as follows:

"Considérant que le défendeur n'a pas droit de plaider à cette cause en la qualité par lui invoquée, parce que personne d'après l'article 19 du Code de Procédure Civile ne peut plaider au nom d'autrui;

"Considérant en outre qu'en supposant que la vente faite par les dits George J. Gebhardt & Cie. serait simulée et frauduleuse, cette simulation ou cette fraude ne pouvait réfléchir contre le demandeur qui a acquis les dits meubles de bonne foi, pour valable considération;

"Considérant que d'après les articles 1025 et 1027 du Code Civil du Bas-Canada, l'aliénation d'une chose certaine et déterminée rend l'acquéreur propriétaire par le seul consentement des parties sans tradition, et ce aussi bien à l'égard des tiers qu'à l'égard des parties contractantes, et qu'en conséquence le demandeur est propriétaire des effets saisis revendiqués," etc.

I am of opinion that this judgment was right, and should not have been reversed by the Court of Appeal, as it has been. Clearly, Moffatt by this plea professes to act in lieu of the creditors of Gebhardt & Co. and of them only. It is not for Gebhardt & Co. and as their representative that he asks the resilia-

tion of these deeds. In that quality he could not have done so, for the simple reason that Gebhardt & Co. could not themselves have done it. And, as to himself, he is not a creditor and does not claim to be one and has personally no interest whatsoever in the case. He is certainly not *procurator in rem suam*. By the said plea he became virtually a plaintiff, in his own name, in an action *Pauliana*, or *en déclaration de simulation*. Now, if he had instituted a direct action of the same nature, would he have done so in his own individual name, or in his quality of assignee? I can answer, without hesitation, that he never would have thought of suing otherwise than in his quality of assignee. Then on what ground can he contend that here he, in his own individual name, has the right to demand for Gebhardt's creditors the resiliation of the said deeds? The only answer he has given to this is, that he had to do it, because he is sued in his own individual name. But, surely, that did not hinder him from filing an intervention in his quality of assignee, or from bringing a direct action in his said quality. That *nul ne peut plaider par procureur* is and has always been the law. In *Nesbitt v. Turgeon* (2 Rev. de Lég. 43), the Court of Queen's Bench, as far back as 1845 (Sir James Stuart, Chief Justice, Bowen, Panet and Bedard, JJ.), held that even in the case where the debtor had expressly agreed that the action against him should be brought in the name of the attorney or agent, it could not be done. There are apparent though no real, exceptions to this rule, but none applicable here, and the respondent has failed to produce a single authority to establish that with us, the assignee or trustee for the benefit of creditors has, in his own individual name, the actions of the creditors. And this alone would dispose of his demand *en résiliation*. Could he, however, be considered as assignee or trustee, he would not have had more success. In the absence of a bankrupt law, the assignee represents the assignor, but not the creditors. Mr. Justice Monk has clearly demonstrated this proposition in his dissenting opinion, and the respondent has cited no authority to the contrary, outside of the writers under the Ordinance of Commerce of 1673, or the

French Code of Procédure, or the code of commerce, all of which are not law here.

In our own courts, I cannot find a single case in which, the point being taken, it has been held, that an assignee under such circumstances can with us act for and in the name of the creditors. In all the cases cited by the respondent and which I have been able to refer to, the assignee was suing for the assignor as his *locum tenens*, and claiming the assignor's rights. In not one of them can I see that the assignee was exercising the personal actions of the creditors, that is the actions given to them alone, and denied to the assignor. *Withall v. Young*, 10 L.C.R. 122, and *Bruce v. Anderson*, Stuart's Rep. 127, would seem to be exceptions to this, but a reference to these cases shows that the point there was not raised by the parties, or decided by the Court. In *Starkie v. Henderson*, 9 L.C.J. 238, it was the assignor's action that the plaintiff had taken, and on the peculiar state of facts, the Court held that there was a privity of contract between himself and the defendant, and that so he had rightly brought the action in his own name. Of course, in exercising the assignor's actions, and claiming the assignor's rights and debts, the assignee does it in the interest of the creditors, as well as of his assignor, but that is quite different. It is then as any *cessionnaire* may do, the actions pertaining to the assignor, not the actions that before the assignment, or without it, the assignor would himself have had, which he then brings. Whilst here the assignee claims rights pertaining to the creditors alone to which his assignor could never have had any claim.

In *Prévost v. Drolet*, 28 L. C. J. 300, in the Court of Appeal, Mr. Justice Loranger, delivering the judgment of the Court, held that an assignee, under an assignment to him by an insolvent for the general benefit of his creditors, not made under the insolvent act, has no quality to sue in his own name for anything connected with such assignment. That was going further than it is necessary to do here. By the report of the cause, one would certainly think that the Court there, were unanimous in that holding. It may be, however, as has been said at the Bar, that the three other Judges composing the Court

simply concurred in the result of the judgment on the plea to the merits, without entering into the question discussed by Judge Loranger. But to make them hold quite the reverse, as contended here by the respondent, simply because the demurrer attacking the plaintiff's right of action had been dismissed by the judgment of the first Court, and because the said judges in appeal did not reverse that judgment, seems to me going far, as the appeal was by the plaintiff, who had obtained *gain de cause* on the demurrer, and who consequently did not complain of the judgment which had dismissed it. However, this is immaterial, the case having no application here, as the plaintiff there also claimed, purely and solely as *locum tenens* of the assignor, a debt due to the assignor.

The cases of *Ferrie v. Thomson and Armour & Main*, 2 Rev. de Lég. 303, and *Mills v. Philbin*, 3 Rev. de Lég. 255, cited by the respondent, do not seem to me to have any bearing on the present case, whilst two reported cases are decidedly adverse to him. In *Chevall v. De Chantal*, 8 L.C.J. 85, it was distinctly held that the assignee cannot judicially represent the creditors of the assignor. And in *Whitney v. Badeaux*, 12 Rev. Lég. 518, Mr. Justice Badgley also held that the assignees of an insolvent cannot *ester en justice* for the creditors.

The respondent has cited some unreported cases from Montreal of 1844 or 1845. I have not been able to refer to them, but they probably were under the then existing Bankruptcy law, 7 Vic, ch. 10, (1843). And from what has been said of them, they were, I believe, all actions belonging to the assignor that had been brought by the assignee.

I may here remark, this assignment was not made for the benefit of Gebhardt & Co.'s creditors generally, but only for the benefit of nine specified creditors, parties to the said deed, the said nine creditors to be paid their claims on the proceeds of the sale of Gebhardt & Co.'s estate, goods and chattels, the surplus if any to be paid over to the said Gebhardt & Co.

Burland, the appellant, was himself one of these nine creditors, and it has been urged upon us that this was fatal to his present action. But I really cannot see how this

alone could confer upon the respondent the right to *enter en justice* as *locum tenens* of the creditors. Burland moreover signed the deed, without prejudice to any privilege or security he had. And when Gebhardt & Co. assigned their goods and chattels, without any description or enumeration whatsoever, and without any schedule annexed to the deed, or any mention whatsoever of the machinery in question here, Burland was, it seems to me, perfectly justified not to see in the deed an assignment of what were then his goods and effects. They ceded their goods not Burland's.

Another serious objection taken against the respondent is that none of the parties to the sale by Gebhardt & Co. to the Canada Paper Co., of which he asks the revocation, are *en cause*; *Lacroix v. Moreau*, 15 L. C. R. 485. Neither the Paper Co. nor Gebhardt are parties to this issue, and neither of them have had an opportunity to contest this demand in revocation. Moffatt here, as I have already remarked, does not represent Gebhardt & Co., and does not pretend to do so. "L'action en rescission, says Bédarride, doit être poursuivie directement contre les auteurs du dol alors même que la chose qui en est l'objet serait passé en d'autres mains," 1er Dol & fraude, No. 298. The reasons this author there gives for this opinion apply to all revocatory actions and to the actions instituted by the creditors not parties to the deed (*Ibid*, No. 273). See also 4 Bédarride, No. 1436, on this point as to the action Pauliana itself. And it is on the party who demands the revocation of any deed under such circumstances, that lies the entire fulfilment of all the conditions necessary for the success of his demand. If Moffatt had formed his demand in rescission by action, he would have had to direct it against Gebhardt & Co., as well as against the Canada Paper Co. and against Burland. Now when he demanded this rescission, as here, by an incidental procedure, why did he not bring *en cause* Gebhardt & Co., and the Canada Paper Co., *en déclaration de jugement commun*? By holding fast to the old and well established rule that, in any proceeding and demand, all the parties interested in its results should be called in, Courts of Justice

will prevent a multiplicity of contestations, and contradictory judgments. For it is evident that, here, for instance, a judgment between the appellant and the respondent could not be opposed to the Canada Paper Co., and would not be *res judicata* as to him. And this would be so perhaps even as regards Gebhardt & Co. Though some cases have gone so far as to say that it is not always necessary that all the parties should be called in, (on what authority does not appear), I am not aware of any case in which a deed has been annulled in the absence of all and every one of the parties thereto. The Court may, perhaps, sometimes, if in the course of the proceedings, it be of opinion that certain other parties have an interest in the case, upon a proper application, order them to be summoned. Bioche, dict. de procéd. vo. *mise en cause*, No. 4. But it would not do so after a final hearing on the merits. If it then appears that though the objection has been taken *ab initio*, the party demanding the rescission has claimed the right and persisted to go on with the case on the issue joined with the adversary he has chosen, his demand must be dismissed. He has failed voluntarily to put the Court in a position to grant it, and his adversary has then an acquired right to its dismissal. Were the Court to order then the *mise en cause* of any other party, it would necessarily follow that the pleadings, *enquête*, and all the proceedings would have to be begun over again, a result which, it is obvious, would be an injustice to the party entitled to a judgment. Moffatt's contention that on an action in revendication, "*Si la chose n'appartient pas au possesseur, vous devez faire assigner son bailleur*" is irrefutably answered on the part of appellant by the fact that he has done so, and that Gebhardt & Co., Moffatt's *bailleurs*, are co-defendants in this suit. That the appellant should have summoned the creditors, I cannot see. Is the plaintiff in a petitory action obliged to put *en cause* the mortgagees? Then, if Moffatt had no right to question the titles upon which the action is based, his doing so cannot have put appellant under the obligation to call in any other party who might have had that right. Burland's action is to re-

vindicate the possession and ownership of this machinery, and is surely well brought against both the actual detainer and the pretended owners of it, (for the assignment would not deprive Gebhardt & Co. of the ownership of it). Then how can Moffatt be admitted to contend that the appellant should have called in the creditors, when he rests and bases his whole case on the ground that he himself here is acting for them and represents them, and that it is entirely and solely for and in their names that he asks the resiliation of the plaintiff's title? If he represents the creditors, they have not to be called in. If he does not represent them, he is out of Court. The rule that when the defendant, in an action in revendication, upon his declaring that he does not hold for himself, has a right, upon saying for whom he holds, to be put *hors de cause*, does not apply, I believe, where the said defendant joins issue and engages in a contestation with the plaintiff. This contestation, it is evident, has to be brought to judgment between the parties to it, and them alone, and the defendant then who has taken upon himself to resist the plaintiff's demand cannot be admitted to complain that the real owner is not *en cause*.

Another important question raised by the appellant and also decided in his favour by the Superior Court, is that he was a second purchaser in good faith of the machinery in question, and that whatever fraud may have been committed between Gebhardt & Co. and the Canada Paper Co., cannot affect his rights to the said machinery and his purchase of it from the Paper Company. *Bédarride, Dol & fraude*, No. 1764—*Demolombe*, 2 des contrats Nos. 198 and 204, and No. 235, 4 *Proudhon, usufruit* No. 2412, *Duranton*, Vol. 10 No. 582,—*Marcadé*, Vol. 4, page 406—*Capmas de la revocation* p. 104, *Table Gén. vo. vente*, No. 13, 737, et seq.—3 *Aubry & Rau*, p. 92. And the great majority of writers on this point are of opinion that the action Pauliana does not lie against a subsequent purchaser in good faith. *Laurent*, Vol. 18, Nos. 464 and seq. and 497 and seq., is, it would seem, of a contrary opinion. However, it is unnecessary for us to consider and determine that question here.

The appeal should be allowed with costs.
Judgment reversed.

Robertson, Q.C., and *Archibald*, for the Appellant.

Bethune, Q.C., *Doutre, Q.C.*, and *Dunlop*, for the Respondent.

COURT OF QUEEN'S BENCH— MONTREAL. *

Perjury by witness in Civil Suit—Production of Record—Materiality of Facts sworn to by Defendant—32-33 *Vict. (Can.)*, c. 23, s. 7—*New Trial ordered upon Reserved Case in Misdemeanour*.—*Held*, 1. The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the defendant is alleged to have given false testimony, is not material where the assignment of perjury has no reference to the pleadings; but the defendant, if he wishes, may, in case the plea be not produced, prove its contents by secondary evidence. 2. It is not essential to prove that the facts sworn to by the defendant, as alleged in the indictment, were material to the issue in the cause in which the defendant was examined. 3. A Reserved Case may be amended at the request of the defendant, during the argument thereon before the full Court, by adding the evidence taken at the trial. 4. (Following *Reg. v. Bain*, 23 L. C. J. 327.) A new trial may be ordered on a Reserved Case, in misdemeanours, where it appears to the Court on the evidence that an injustice may have been done to the defendant. *Regina v. Ross* (Reserved Case.)

Intervention—Prescription—42-43 *Vict. (Q.) ch. 53—Assessment roll*—31 *Vict. (Q.) ch. 37—Held*: 1. Where an action had been brought by one of several persons assessed for the cost of a special improvement, to set aside the assessment roll, that any other person assessed for the cost of the same improvement had an interest which entitled him to intervene if the principal plaintiff abandoned the case. 2. Where the principal action was instituted before the expiration of the delay fixed by a Statute for contesting assessment

* The above cases will be reported in full in the *Montreal Law Reports*, 1 Q.B.

rolls, the right of an intervenant taking the same conclusions as those of the principal action was not barred, though the delay had expired before the intervention was filed. 3. Under the Statute 31 Vict. (Q.), ch. 37, it was necessary that the Commissioners appointed to carry out an expropriation and to determine the parties interested therein and to be assessed for the purpose of the proposed improvement, should give public notice of their proceedings in the manner therein provided, and in the absence of such notice the assessment roll made by the Commissioners was null and void; nor could the subsequent homologation of the report of Commissioners by the Superior Court give validity to such proceedings.—*Hubert & The City of Montreal.*

Vente d'immeubles—Crainte de l'acheteur d'être troublé—Cautionnement—Art. 1535 C. C.—Matière discrétionnaire—Limitation du cautionnement.—Jugé:—1. Que la question de savoir si l'acheteur a juste sujet de craindre d'être troublé et peut demander caution en vertu de l'art. 1535 C. C., est une matière discrétionnaire, dans laquelle cette Cour sera peu disposée à déranger le jugement de la Cour de première instance. 2. Que lorsque la Cour de première instance a condamné le vendeur à donner caution, sans limiter la durée de tel cautionnement, la Cour d'Appel reformera le jugement à cet effet.—*Biron & Trahan.*

Master and Servant—Injury sustained by servant—Responsibility of Employer—Fault—Held: That where a servant meets with an accident while engaged in the ordinary duties of his employment, and the accident is not the result of any fault or negligence on the part of the employer or of those for whom he is responsible, the servant or his representatives has no right to recover damages from the employer.—*La Compagnie de Navigation du Richelieu et Ontario & St. Jean.*

Charter-party—Time—Rejection of Contract. The appellant, in January, 1879, agreed to charter a steamship, for the carriage of live cattle to England, and the conditions of the charter-party were that the steamship should proceed to Montreal with all convenient speed to arrive there 'between' the opening of navigation in 1879, and thereafter to run regularly between Montreal and Lon-

don, and to be dispatched from Montreal in regular rotation with other steamers to be chartered up to 1st October, 1879. Navigation opened at Montreal about 1st May, but the steamship did not arrive there until 5th June when the appellant refused to load.—*Held,* that there was not a substantial compliance with the contract on the part of the ship, and that the appellant was entitled to throw up the charter-party.—*McShane & Henderson et al.*

Contract—Rescission for fraud—Rights of innocent third party.—Held,—That the rescission, on the ground of fraud, of a deed transferring real estate, will not affect the rights of a third party who in good faith has lent money on the property while in the possession of the purchaser, where the vendor, by his own act or fault, has to some extent, induced the third party to make the advance. So where the plaintiff sold certain real estate to defendant (who then obtained an advance from C. on the security of the property), and in the deed from plaintiff to defendant, it was declared that the consideration was cash paid by the purchaser, whereas in fact the consideration was mining stock which turned out to be worthless, it was *held,* that the plaintiff was in fault in permitting and requesting such misstatement as to the consideration to be inserted in the deed, which misstatement might to some extent have induced C. to advance money on the property; and therefore the plaintiff was entitled to obtain the rescission of the deed for fraud, *only on condition of his re-imbursing to C. the amount of his advance.*—*Lighthall & Craig.*

Master and Servant—Responsibility of employer for accident resulting from defects in machinery—Negligence of laborer.—Held, 1. An employer is responsible for injuries to his employees resulting from defects in the tackle, machinery or appliances provided for their use. Tackle used in work such as loading or unloading a vessel ought to be amply sufficient to withstand any strain that is likely to be put upon it by ordinary unskilled laborers; and where tackle breaks, without any extraordinary strain upon it, it will be presumed to be insufficient, though it may have been used previously for the same purpose without accident. 2. A laborer engaged in work such as loading or unloading a vessel is only bound to use ordinary care, and the employer is not relieved from responsibility by showing that if the laborer had used the greatest skill and care the accident might not have happened.—*Ross & Langlois.*

The Legal News.

VOL. VIII. MAY 16, 1885. No. 20.

JOEL P. BISHOP.

Joel Prentiss Bishop, the well-known author, furnishes a short sketch of his life to the *Central Law Journal*. The accompanying portrait represents a vigorous old gentleman with pleasant features. Mr. Bishop says:— I was born March 10, 1814, in Volney, Oswego county, New York, in a small log house in the woods, remote from all other habitations but one. While yet a babe, my mother being sick and soon to die, I was taken to my father's former place of residence, Paris, Oneida county, in the same State, and I have no remembrance of Volney. My father was a farmer of small means, yet owning his fertile sixty acres, and I worked with him, attending a remote district school three or four months in the year, and finally graduating into "the academy." The schoolmaster of the district school was changed every term; and, regularly at its close, the retiring one visited my father and urged him to send me to "college." My own aspirations grew, and at about the age of sixteen an arrangement was made with my father to permit me to leave the farm and get an education by my own exertions. I found poverty to be no obstruction. While yet sixteen I taught a public school. And by such and other means I readily obtained the money for clothing, tuition and books. I could always earn my board without hindrance to my studies. But health soon failed, and then began the struggle. I did everything to baffle disease; relinquished study, returned to it under circumstances thought to be more favorable, broke down again, varied the experiment, and so on, for how many times I do not remember. When twenty-one, I became fully satisfied that the struggle was useless, and gave it up. I did not, like Blackstone, write a "Farewell to the Muse," but a "Farewell to Science." It was dated July 19, 1835, and published in "The Literary Emporium," of New Haven, Conn., near which

place I then was, in the number for October 3, 1835. I made, in the "Farewell," one reservation, expressed in the following words:

"Though thus I bid adieu to Learning, where
She sits in public places, or bows and waves
Her plumes from off her star-clad height to meet
The gaze of millions, still I may invite
Sometimes her presence in a humble garb,
To cheer me in my lone, obscure retreat."

Acting on this reservation, and otherwise letting "Learning" alone, and having drifted to Boston, I entered a law office in the fall of 1842, hoping to obtain a little useful information, but with no idea of having health to practice the law. Here came another, yet agreeable, disappointment. At the end of a year and four months, I had fully supported myself by literary work outside the law, undergone an examination by the judge as to my competency in the law, taken the proper oath for admission to the bar, opened an office, and entered upon legal practice. Indeed, legal practice with me began six weeks after I was enrolled as a student, when required by circumstances to draw, without other help than a little preliminary explanation, a special declaration in an important case which went through the courts, and "stood." And afterward I had managed all the small-court business of the office, consulting with clients, and trying their causes. During this period also, I tried and won my first jury case in the higher court. So practice had become familiar to me; and, considering how slowly my short preparation compelled me to work, there was no lack of clients.

My business was divided between large and small, but most of it was the latter. This, preferring the former, I determined to get rid of; and, as a side exercise during the change, to write a law book. Hence my "Marriage and Divorce," which was published in one volume just ten years after I entered a law office as a student. It brought me a constant succession of requests and advice to write other books. I saw that I could not both write books and practice; so, with the approbation of the only person entitled to object, I made the great sacrifice of my life by relinquishing practice, and entering upon legal authorship—whether for the benefit or injury of mankind time only can disclose.

LORD JUSTICE LINDLEY ON LAW REPORTING.

Let us consider, then, what are the legitimate wants of all branches of the legal profession with respect to law reports. They are both negative and affirmative.

The profession does not want reports of cases valueless as precedents, nor long reports of complicated facts when a short condensation of them is all that is necessary to understand the legal principle involved in the decision. This observation applies not only to the reports themselves, but particularly to the head-notes of the cases reported. The legal pith of a case, and nothing more, should appear in its head-note.

The affirmative wants may be considered under three heads—viz. (1) The subjects reported; (2) The mode of reporting them; (3) The time and form of their publication.

1. The subjects reported should include all cases which introduce, or appear to introduce, a new principle or new rule, or which materially modify an existing principle or rule, or which settle, or tend to settle, a question on which the law is doubtful, or which for any other reason are peculiarly instructive.

If these principles are not attended to, the reports will be unnecessarily bulky, and time and labour will be wasted. But in applying these principles to practice, it must be borne in mind that the reports are wanted not only by men who are already well-informed lawyers, but also by men of a different class; and for their sakes it is better to err on the side of reporting too many cases than of reporting too few. Collections of rubbish must be carefully avoided; but if an experienced reporter is in doubt as to whether a case is worth reporting or not, it will be safer to report it, however shortly, than wholly to omit it.

Practically the great difficulty is to decide what ought to be done with cases turning on the construction of written documents, and with what are called Practice cases. As regards cases on the construction of documents, they should be excluded, unless there is some good reason for including them. Cases turning on obscure sentences in wills,

contracts, or letters, which sorely puzzle those who have to put a meaning on them, are absolutely useless for future guidance, and should not be reported at all. At one time there was a tendency, especially in the Chancery Courts, to try and construe one will by means of decisions on other wills more or less like it; but this tendency has been checked of late years, and there is not now any excuse for reporting decisions on wills simply because they were difficult to construe. Similar observations apply to other documents. Some cases on the construction of documents are, however, very useful. Such are new lights thrown upon common forms—e.g. in charter-parties, policies of insurance, ordinary covenants or trusts, etc., or new interpretations of some Act of Parliament of general application, or of rules of Court. Cases of this kind are unquestionably useful as guides, and should be reported.

2. As regards the mode of reporting. The great point to bear in mind is that what the profession wants is law, and such facts only as are necessary to enable the reader of the report to appreciate the law found in the case. Keeping this in mind, reports should be accurate, full in the sense of conveying everything material and useful, and as concise as is consistent with these requirements. The points contended for by counsel should be noticed, and the grounds on which the judgment is based should receive especial attention. The whole value of a report depends on this part of it, and on the distinctness with which it is brought out. In this respect much of course depends on the judge, and the care he takes to make plain the grounds of his decision. But much also depends on the reporter. Even when a judgment is written, much of it may relate to matters requiring decision but not worth reporting; and it should be shortened accordingly.

3. As regards the time and form of publication, the profession wants the reports published as speedily as possible—good print, good paper, a convenient portable size, convenient arrangement of matter, good indexes, and the lowest price consistent with the payment of the expenses of publication.—*The Law Quarterly Review*.

AN ENGLISH JUDGE ON SHYLOCK.

In these days, when so many people are inclined to take liberties with property, it seems likely that the "League" which has been formed to protect both liberty and property will find enough to do. There are, of course, traducers of this excellent body, for what great organization was ever started which has not been made the shaft of misplaced or even malicious criticisms? One of the lights of the "Liberty and Property Defence League" is Lord Bramwell, and we are surprised to find that his views on these subjects have incurred the gentle ridicule of Sir William Harcourt. The Home Secretary lately ventured to assert that Lord Bramwell entertained so vast a reverence for all kinds of property that if he had been called upon to decide the legal dispute in "The Merchant of Venice," he would infallibly have declared that Antonio's pound of flesh must be given to his creditor. Lord Bramwell, with the frankness which usually characterises him, has met Sir William Harcourt's little joke by an answer delivered from the judicial bench. In the course of an Appeal Court case the learned judge took occasion to respond to the witty illustration of the Home Secretary. Far from expressing the slightest shame or penitence for the views which he holds as to the sacredness of property of all descriptions, Lord Bramwell actually seems to glory in them. The session of the Court of Appeal was probably the earliest opportunity that was presented to him of answering Sir William Harcourt's banter; but at all events, he seized on the opportunity and turned it to the best account. It is interesting to hear what a judge—especially a judge of Appeal and a law lord—thinks of the legal bearings of a Shakespearian drama. Apparently the Swan of Avon, if he ever had any legal training, which is doubtful, did not profit by it enough to avoid falling into error in what may be called the *cause célèbre* of *Shylock v. Antonio*. Portia's statement of the case would, Lord Bramwell tells us, have induced him to give the pound of flesh to the usurer, except for one little flaw in her argument. The flesh had not been "appropriated," and could not, therefore, be regarded as property to which Shylock had a good legal right until

it had been cut from Antonio's quivering body. Supposing Lord Bramwell to have been sitting *in banco* with the Doge of Venice on the occasion of the famous trial, and the pound of flesh had been lying on a table, ready cut; in that case the decision of the English judge would have been in favor of the plaintiff's claim to the possession of the horrible piece of "property." But then, as Lord Bramwell truly remarks, in order to get the flesh, assault, and even murder, would have had to be committed, and therefore the contract was null and void from the beginning. No doubt it was stupid of Shylock not to have taken counsel's opinion on this point before he lent the money to the merchant; but malice made him forget his prudence and cleverness for a time. Portia accordingly, when she argued that Antonio must part with sixteen ounces of his "personal property," was distinctly in error, and the Venetian Court unhappily was acting *ultra vires*, as Courts sometimes do. It had no right to tell the Jew to take the flesh, but to be careful "to spill no drop of blood" with it. The moment Shylock had advanced towards his victim, knife in hand, he would have been technically guilty of an assault with intent, and would have been obliged to appear at the police court of the period next morning to hear what the sitting magistrate thought of the offence.—*London Telegraph*.

COURT OF QUEEN'S BENCH.

[In Chambers.]

MONTREAL, April 29, 1885.

Coram CROSS, J.

WYLIE et vir, Appellant, and THE CITY OF MONTREAL, Respondent.

Appeal to Supreme Court—Future Rights.

The appellant was condemned by the Superior Court (7 L. N. 28) to pay the respondent \$408, for taxes due to the City, for the years 1878, 1879, and 1880, on property belonging to Appellant, and by her used as a girls' private school. This judgment was, by a majority of the Court, confirmed in Appeal.

Kerr, Q.C., petitioned for leave to appeal to the Supreme Court, basing his right so to do upon the ground that the judgment com-

plained of affected the future rights of the parties, for if it were not reversed, it would have the effect of authorizing the respondent to collect taxes of the nature claimed, from the appellant yearly.

Roy, Q.C., opposed the application, on the ground that the amount of the action and judgment was under \$2,000, and that the case did not involve future rights, as the assessment was made yearly, and might be discontinued or not imposed hereafter. Cited *Lussier & Corporation of Hochelaga*, 3 L.N. 309.

Cross, J., held, referring to *Les Soeurs de l'Asile de la Providence de Montréal & Le Maire et les Conseillers de la Ville de Terrebonne*, in which leave to appeal was granted by Mr. Justice Monk on 9th April last, that the case was one which was comprehended under the term "Future Rights," that it was dangerous to refuse to allow leave to appeal, and that where there was any difficulty leave would be given, as the respondent would always have his recourse before the Supreme Court to have the appeal rejected summarily.

Kerr, Carter & Goldstein, for Appellant.

Rouer Roy, Q.C., for Respondent.

COURT OF QUEEN'S BENCH.

QUEBEC, Feb. 8, 1884.

Before MONK, RAMSAY, TESSIER, CROSS, and BABY, JJ.

LA CORPORATION DU COMTÉ DE DORCHESTER (def. below), Appellant, and COLLET (plff. below), Respondent.

Municipal Corporation—Road—Expropriation.

Held, That the Corporation, appellant, had no power to take any of the respondent's land for a road, without fulfilling the formalities prescribed by law for the expropriation of the land required for such road. The general reserve in the letters patent from the Crown is made in favour of the Crown only, and does not pass to the municipal authority.

For remarks of Justices Tessier and Baby see 10 Q.L.R. 63.

RAMSAY, J. (concurring in the judgment): This action is possessory by respondent, for taking possession of land for a road without proceeding to expropriate.

The naked question as to the right to this action when the municipality has not adop-

ted the proper preliminary steps to expropriate the owner, has been so frequently decided by all the Courts of this Province that it will readily be supposed it was not the object of the appellant to test it again. But the pretention of the appellant is that by the original grant of the land from the Crown there was a reservation of the right to make as many roads as the Crown might require on the land in question, that this right passed to the municipalities, and is recognized by the Art. 906 M.C.

The words of the grant on which appellant relies are as follows:—

"And we do hereby expressly reserve to us, our heirs and successors, a right of making any number of public roads or highways, of a width not exceeding one hundred feet, through any part of the said land and premises hereby granted, except such part whereon any dwelling-houses or other houses or dwellings shall be erected."

This reserve is evidently personal to the Crown, and would not necessarily pass to the municipality; but it is said that as no indemnity is to be granted, or as the English version elegantly and correctly has it "must be granted," for the "land reserved for a public road in the grant or concession of a lot," therefore the municipality can avail itself of the reserve to the Crown. I cannot adopt this view. The code evidently refers to a specific reserve of so much land for road purposes, not to a general reserve of this kind. But, in addition to this, I don't think the Crown could take the land without indemnity under a general clause of this sort. It never has been suggested, so far as I know, that a general reserve of this kind was not subject to indemnity for damage. As an illustration, in the case of the *Duke of Buccleugh v. Wakefield*, L.R. 4 H.L. 377, where there was a contest as to whether the appellant had a right to destroy the whole surface under a general reservation of mines, the obligation to indemnify was taken as a matter of course. There was, therefore, an indemnity to be established.

I am to confirm.

Judgment confirmed, Baby, J., dissenting.

Beleau, Stafford & Beleau for appellant.

L. Taschereau for respondent.

COUR DE CIRCUIT.

MONTRÉAL, 16 mars 1885.

Coram CARON, J.

POMINVILLE v. GAUTHIER.

Commerçants de chevaux—Chevaux en pension—Prescription.

JUGÉ:—1o. *Que celui qui, bien que commerçant de chevaux, ne tient cependant pas par état de chevaux en pension, ne peut, pour les fins de la prescription, être assimilé au maître de pension; pas même dans le cas où il aurait gardé dans ses écuries et nourri pendant quelques jours, des chevaux appartenant au défendeur.*

2o. *Que dans l'espèce, la prescription annale établie par l'article 2262, No. 4, du Code Civil, n'a pas d'application.*

Le demandeur réclamait du défendeur la somme de \$18.60, pour avoir nourri pendant quelques jours huit chevaux appartenant au défendeur.

A l'encontre de cette action, le défendeur produisit entre autres plaidoyers, le suivant:

Que tous les faits allégués en la déclaration du demandeur sont faux et mal fondés.

Qu'en supposant même qu'il serait dû au demandeur comme il le prétend, le montant mentionné en la dite déclaration, tel montant serait prescrit par la prescription d'un an, en vertu de l'article 2262 du Code Civil. Et il concluait au renvoi de l'action.

La preuve démontra [que bien que le demandeur fût commerçant de chevaux il ne tenait pas et n'avait jamais tenu *par état* de chevaux en pension. Mais dans l'occasion en question il avait pris soin de huit chevaux appartenant au défendeur et les avait nourris dans ses écuries pendant plusieurs jours en attendant que le défendeur trouvât à les vendre.

A l'audience, le défendeur qui appuyait ses prétentions sur l'article 2262 du Code Civil, appela d'une manière toute spéciale l'attention de la cour sur cet article.

De son côté, le demandeur cita les autorités suivantes:

Troplong, t. 2, Prescription, No. 970, qui s'exprime comme suit:

"Du reste, il ne faut pas assimiler ni aux traiteurs, ni aux maîtres de pension, ceux qui

par obligeance, fournissent les aliments à un individu dans le besoin.

"C'est à ce sujet que Dumoulin, dans son apostille sur l'article 313 de l'ancienne coutume d'Orléans, propose l'espèce d'une fille de treize ans, qui, chassée par sa mère, s'était retirée dans la maison de son oncle qui l'avait nourrie pendant deux ans et demi. On opposa après son mariage la prescription (d'un an) contre la demande d'aliments faite par l'oncle qui avait rendu ce service à sa nièce. Dumoulin décida que l'oncle était bien fondé dans sa réclamation."

Au No. 971, Troplong ajoute:

"Je pense qu'on devrait rendre une décision semblable pour les personnes qui, *sans esprit de spéculation* et par pure amitié, reçoivent à leur table, moyennant une indemnité, une personne dont la compagnie leur est agréable. Les articles 2271 et 2272, ne font figurer dans leurs catégories diverses que des individus *qui font métier, état ou profession de leur travail, de leur art ou de leurs fournitures*. Il n'en est pas de même dans notre espèce."

Le demandeur cita de plus, Brodeau, sur Paris, art. 129, No. 1.

Et la cour, après délibéré, déclara que la créance du demandeur n'était pas soumise à la prescription annale invoquée par le défendeur, rejeta en conséquence son plaidoyer de prescription et donna gain de cause au demandeur.

Action maintenue.

Augé & Lafortune, pour le demandeur.

Béique, McGoun & Emard, pour le défendeur.

(J. G. D.)

COUR DE CIRCUIT.

MONTRÉAL, 13 avril 1885.

Coram JETTÉ, J.

POITEVIN v. ETIENNE et al.

Protêt—Coût du protêt.

JUGÉ:—*Que le coût d'un protêt notarié est recouvrable en justice, si la partie mise en demeure s'est soumise à ce protêt et a exécuté ce qu'on exigeait d'elle par ce protêt.*

Les propriétés des parties en cette cause sont contiguës et les défenderesses ont laissé croître auprès des bâtiments du demandeur, et à une distance prohibée par la loi, des ar-

bres dont les branches s'étendaient sur sa propriété et étaient devenues pour lui une véritable nuisance, sans compter qu'il avait souffert des dommages réels par l'humidité que lesdits arbres entretenaient dans ses bâtiments.

Le demandeur se plaignait souvent aux défenderesses de la nuisance et des dommages en question et les somma, à diverses reprises, en présence de témoins, d'avoir à enlever les dits arbres ou du moins d'en couper les branches; et comme elles ne tenaient aucun compte de ses plaintes et sommations verbales, il les fit protester par le ministère d'un notaire, de se conformer à ses réquisitions sous les peines de droit.

Leur réponse au protêt fut un refus formel. Cependant elles jugèrent plus prudent de couper les branches des arbres en question; ce qu'elles firent en effet quelques jours après le protêt.

C'est le coût de ce protêt, \$8.60, que le demandeur a réclamé par la présente action.

Les défenderesses ont contesté cette action et allèguent entre autres choses par leur défense :

Que les arbres en question n'ont jamais causé de dommages au demandeur.

Que le protêt dont le coût est réclamé en cette cause était inutile et qu'elles ne sont pas tenues de payer ce protêt.

Que si, après le protêt, elles ont coupé quelques branches aux arbres en question, c'était sur l'avis de leur avocat, et dans le but d'éviter des difficultés. Et elles concluaient au renvoi de l'action.

Au soutien de ses prétentions le demandeur a invoqué les autorités suivantes :

11 Demolombe, pp. 548 et 578. Pothier, Société, No. 242. 1er Guyot, Rép. Vo. Arbre, p. 561. Merlin, Rép. Vo. Arbre, No. VI. 10 L. C. J. 82, Lecours v. La Corporation de la paroisse de St. Laurent.

Et la cour, tenant compte des autorités ci-dessus et prenant en considération que les branches des arbres en question se projetaient sur la propriété du demandeur et que les défenderesses avaient jugé à propos de couper ces branches, après la signification du protêt, les condamna à payer au demandeur

la somme de \$8.00 pour le coût dudit protêt, avec dépens.

Action maintenue.

Archambault, Lynch, Bergeron & Mignault, pour le demandeur.

O. Gaudet, pour les défenderesses.
(J.G.D.)

COUR DU RECORDER.

MONTRÉAL, 11 avril 1885.

Coram DEMONTIGNY, Recorder.

LA CITÉ DE MONTRÉAL v. FENNELL et SCHILLER, *oppt.*, et LA DITE CITÉ, *cont.*

Cour du Recorder—Jurisdiction—Opposition afin de conserver—Frais privilégiés.

JUGE:—1o. *Que la Cour du Recorder a juridiction pour recevoir une opposition afin de conserver sur le produit des meubles du débiteur.*

2o.—*Que le premier saisissant a un privilège sur les deniers prélevés pour les frais de saisie-gagerie.*

L'opposant avait obtenu jugement contre le défendeur sur un bref de saisie-gagerie. La demanderesse a fait saisir les mêmes meubles appartenant au défendeur pour taxes d'affaires et d'eau, et a procédé à la vente avant que l'opposant eût pu exécuter son jugement. Ce dernier fit alors signifier à la demanderesse une opposition afin de conserver pour les frais encourus avant la saisie de la demanderesse.

Cette opposition fut contestée par la demanderesse, sur le principe que la Cour du Recorder n'avait pas de juridiction en ces matières; que la dite demanderesse n'avait pas saisi en vertu d'un jugement de la Cour du Recorder, mais en vertu d'un rôle de cotisation qui en loi équivalait à un jugement, et que, par suite, la Cour ne pouvait maintenir une opposition de la nature de celle de l'opposant, et adjuger sur l'exécution d'un jugement qu'elle n'avait pas rendu elle-même.

La Cour fut d'opinion qu'elle avait juridiction et que l'opposition afin de conserver était bien fondée.

Opposition maintenue.

L. Ethier, avocat de la demanderesse contestante.

De Martigny & De Martigny, avocats de l'opposant.

(J.J.B.)

JURISPRUDENCE FRANÇAISE.

Assurances contre l'incendie—Demande d'indemnité—Exagération des évaluations—Absence de fraude—Renonciation de la compagnie.

1o. La clause d'une police d'assurance contre l'incendie stipulant que l'assuré encourt la déchéance de son droit à l'indemnité lorsqu'il a exagéré le montant du dommage subi, ne peut recevoir son application en l'absence d'une intention frauduleuse et dolosive de la part du sinistré.

2o. Ce caractère frauduleux et dolosif ne se trouve pas dans le fait par l'assuré d'avoir grossi l'importance de ses pertes dans un état qu'il a adressé le jour même de l'incendie, au milieu du trouble profond que lui causait le sinistre, et alors surtout qu'il s'est désisté aussitôt après sa première évaluation qu'il n'a pas reproduite devant la justice.

3o. Il y a d'ailleurs renonciation tacite de la part de la compagnie assureur, à se prévaloir de cette déchéance dans la déclaration par elle faite d'être disposée à donner satisfaction au sinistre dans la mesure indiquée par le rapport des experts.

(5 déc. 1884. *Cour d'Appel de Paris. Gaz. Pal.* 1-2 mars 1885.)

Bail—Cession — Garantie — Cession intermédiaire.

L'engagement contracté par le preneur originaire de garantir au bailleur le paiement des loyers solidairement avec son cessionnaire en cas de cession, constitue une obligation exclusivement personnelle et qui ne lie que celui qui l'a consentie.

En conséquence le bailleur dans le cas de plusieurs cessions successives n'a d'action directe que contre le preneur originaire et le cessionnaire actuel, le premier en vertu du contrat, le second comme occupant les lieux ; les cessionnaires intermédiaires n'étant tenus que d'une obligation corrélatrice au temps de leur jouissance.

(17 déc. 1884. *Cour d'Appel de Paris. Gaz. Pal.* 10 mars 1885.)

Avoué—Mandat ad litem—Production à une faillite et à un ordre—Inscription non renouvelée—Etendue du mandat.

Le mandat *ad litem* est limité par les règles générales qui régissent l'exercice du minis-

tère de l'avoué au devoir d'accomplir exactement les formalités prescrites par la loi pour la régularité des procédures.

Spécialement le mandat de l'avoué, chargé de faire vérifier et admettre une créance hypothécaire au passif d'une faillite, et de produire à l'ordre, qui sera ultérieurement ouvert sur le prix des immeubles du failli, ne peut être étendu à l'obligation de renouveler l'inscription de l'hypothèque qui garantit ladite créance. Un mandat spécial conféré à l'avoué et accepté par lui aux fins de ce renouvellement est nécessaire, pour que, par le non accomplissement de cette mesure, sa responsabilité puisse se trouver engagée.

(17 fév. 1885. *Cassation. Gaz. Pal.* 11 mars 1885.)

LARGE FEES.

It is said that the Bell telephone company paid Mr. J. J. Starrow, the prominent patent lawyer of Boston, a fee of \$25,000, with an additional contingent fee of \$25,000 in case of success. A fee of \$50,000 is a good round sum for a single case, but his services were worth that much to the Bell telephone company.

This is the largest fee we know of that has been paid recently. The firm of Butler, McDonald & Butler, of Indianapolis, Ind., some time ago received \$30,000 for "closing out" the Indianapolis and St. Louis Railroad.

If a St. Louis paper is to be relied on, "heathen Bob" Ingersoll received a good round sum for his services in the famous Star Route cases. It says:

"While ex-Senator Dorsey was here in attendance on the cattle convention he was asked one day how much he paid Bob Ingersoll for his defence in the Star Route trials. "Well," said he, "it was very curious how that was done. From the beginning to the end of the trial Ingersoll never asked me for a dollar. One day, after I had been acquitted at the second trial, I met Ingersoll and I asked him how much I owed him. He at first declined to talk about it, saying he had no charge to make and he didn't care if he never got a cent. I asked him to walk a few squares with me, and we went to the safe deposit building. I unlocked my box and took out a

four per cent. government bond for \$100,000 and gave it to him. He put it in his pocket and we walked away, and have not referred to the subject since."

This recalls the story of Hon. Joe Geiger's first "big fee." It seems that a few years after he had commenced practicing law Joe did some very "clever" work for a certain railroad, which they appreciated very highly. Joe was aware that his services had been of great value to the company and he was meditating what amount he should charge, and was trying to screw his conscience up to charging a fee of \$200. When the accountant of the road called on him, told him how well they were pleased with the work he had done for them, and told Joe he had come to pay him, and produced a large roll of \$500 bills, and counted down four, and then paused, saying, "how much, Mr. Geiger, will it take to satisfy you?" Joe very complacently replied, "Oh, another one of those will do."—*American Law Journal*.

RECENT DECISIONS AT QUEBEC.*

Terme incertain — Condition potestative — Fixation de délai.—*Jugé*, Que lorsque le contrat recule l'exigibilité du paiement jusqu'à l'accomplissement d'un fait dépendant de la volonté du débiteur, le créancier ne peut pas, sans aucune fixation de délai et sur sommation notariée au débiteur d'accomplir le fait et de payer, le poursuivre et conclure purement et simplement au paiement; qu'il ne peut conclure qu'à la fixation par le tribunal, d'un délai pour l'accomplissement du fait et au paiement après son expiration.—(En Révision) *Bartley v. Breaky*.

Provisions — Privilège — Hôtelier.—*Jugé*, Que le fournisseur de provisions à un hôtelier n'a pas de privilège; et que, si l'hôtelier vit avec sa famille dans l'hôtel qu'il exploite, le privilège n'existe que pour la proportion des provisions qui a servi à nourrir, lui et sa famille.—(En Révision) *Ross v. Blouin*, et *Daly et al.*, oppts.

Alimentary allowance — Imprisonment — Capias ad respondendum.—*Held*, that a defendant imprisoned under a *capias ad respondendum*

has a right, if he be a pauper, to obtain an alimentary allowance from the plaintiff. McCord, J., said: At the argument it was contended by the counsel for the plaintiff, that the provisions of sect. 6 of ch. 87, C. S. L. C., having been codified under the head of coercive imprisonment, and omitted under the head of *capias ad respondendum*, in the Code of Civil Procedure, these provisions no longer apply to *capias*, and are restricted to cases of coercive imprisonment, in the sense of *contrainte par corps*, especially as the words of the article 790 are "any person thus imprisoned." I cannot admit this view to be correct. The mere omission to provide in this code for the obtaining of an alimentary allowance in cases of *capias* has not, in my opinion, the effect of repealing the provisions of the Consolidated Statute as regards *capias* (see 1360 C. C. P.), and the incorporation of these provisions, under the head of coercive imprisonment, merely extends them to this kind of imprisonment. Such would be my opinion, even if I were to be guided by the Code of Civil Procedure only; but on reference to the Civil Code, article 2277, I see that it provides that the Consolidated Statute shall apply to cases of *capias*; and this is a sufficient reason for holding that the provisions of that statute are not repealed by any omission in the Code of Procedure, especially as the right to imprison a British subject and the right of that subject, if he be a pauper, to obtain an alimentary allowance, may be considered as matters of civil rights rather than as mere matters of procedure.—(S. C.) *Killoran v. Waters*.

Certiorari — Conviction — Penalty — Minors.—*Held*, 1. Where the conviction is for a penalty, the complainant cannot free himself from his liability to costs on *certiorari*, by renouncing the conviction: especially if he contests the *certiorari*.

2. A complainant, having obtained a conviction against minors, cannot set up their minority against them, when they seek redress from that conviction by means of *certiorari*.

3. A conviction may be quashed upon an inscription on the merits of the *certiorari*, without motion to quash, if the quashing has been prayed for in the petition for *certiorari*.—(S. C.) *Hebert et al. v. Paquet*.

The Legal News.

VOL. VIII. MAY 23, 1885. No. 21.

The practice of laying carpets or pieces of matting in front of houses in which entertainments are being given, has come under judicial notice in three recent cases tried before Lord Chief Justice Coleridge in London. In *De Tyron v. Waring*, the latest of the three suits, the defendant, having an entertainment at his house in Grosvenor Square, had spread a matting across the sidewalk for the benefit of his guests. The plaintiff while passing by tripped in the matting and fell down. He alleged injuries, sued for damages and obtained a verdict for \$300. The following colloquy which took place between the Chief Justice and the counsel for the defendant sums up the law on the subject:—

LORD COLERIDGE—If a person puts anything across the pavement and a person stumbles over it, the owner is liable for the consequences. The passenger is not bound to look for mats on the highway. He may look at the stars if he likes.

MR. McINTYRE—He may run his head against a lamp-post.

LORD COLERIDGE—The lamp post is rightfully there, but any one who has a mat or carpet spread over the pavement must take care of it.

MR. McINTYRE—The passenger may be guilty of contributory negligence.

LORD COLERIDGE—Possibly, but he is not bound to look for mats on the pavement, and his not looking for them is no evidence of negligence. Probably there was light enough for him to see the mat if he looked for it, but he was not bound to look for it. He may look at the stars if he pleases—if he can see them.

The Act 48 Vict., ch. 13 (assented to 9th May, 1885,) enacts as follows:

1. The first two paragraphs of sub-sect. b of sect. 2 of the Act 47 Vict., ch. 8, are replaced by the following:

"In the districts of Montreal, Three Rivers, and St. Francis, every juridical day is reputed to be a term day for all purposes whatever."

2. The last paragraph of the said sub-section b of the said section 2 is amended by striking out the words "in the district of Montreal only," in the first line thereof, and replacing them by the following: "except in the district of Montreal."

AMENDMENTS TO THE CODES.

The Act 48 Vict., ch. 20, makes the following amendments to the Civil Code and the Code of Civil Procedure:—

AMENDMENTS TO THE CIVIL CODE.

1. Article 1543 of the Civil Code is amended by adding thereto the following paragraph:

"In the case of insolvency such right can only be exercised during the fifteen days next after the delivery.

2. Article 1896 of the said Code is amended by adding the following paragraphs:—

"If a partnership be dissolved or a judicial demand be made for such dissolution, the Court or the Judge, upon the demand of one of the partners, after notice given to the others, has power to appoint one or more liquidators.

"The liquidators so appointed shall be sworn to well and faithfully perform the duties of their office;

"They immediately give notice of their appointment by an advertisement to that effect, published in the *Quebec Official Gazette*, and in two newspapers, one in the French and the other in the English language, published at the place of business of the partnership or at the nearest place and in such other manner as the Court or Judge may prescribe.

"They become *pleno jure* seized of the assets of the partnership for the purpose of the liquidation; they furnish the security prescribed by the Court or Judge, and are in all respects subject to the summary jurisdiction of such Court or Judge.

"They possess all the powers and are subjected to all the obligations of judicial sequestrators, with the exception of the putting into possession, which is done without the intermediary of a bailiff.

"Acts exceeding those of administration, cannot be performed by the liquidators without the consent of all the partners, and in default of such consent only with the approval of the Court or Judge, after previous notice to the members of the partnership.

"The remuneration of the liquidators is fixed by the Court or Judge.

"Proceedings respecting the appointment of liquidators and the performance of the duties of their office are summary.

"Provisional execution takes place notwithstanding the appeal, saving the right of the Court to which the cause is taken in appeal to summarily suspend such execution.

"Two judges of the Court seized of the appeal may also give such order for suspension after notice to the adverse party."

3. Article 2272 of the said Code is amended by substituting the figures "47" for the figures "57" in the second line of paragraph 5.

AMENDMENTS TO THE CODE OF CIVIL PROCEDURE.

4. Article 1 of the Code of Civil Procedure, as amended by the Acts 37 Victoria, chapter 8, section 6, and 47 Victoria, chapter 8, section 3, is further amended by adding the following paragraph:

"Notwithstanding the preceding provisions, the proceedings under Articles 645, 663, 678, 679, 680, 712, 720, 730, and 763 to 780 of this Code inclusively, may be had upon any juridical day."

5. Article 92 of the said Code is amended by striking out the last paragraph thereof.

6. The following articles are added to the said Code after Article 343:

343a. Except in actions to annul a marriage, for separation of property, or from bed and board, to obtain the dissolution of a corporation or the annulling of letters patent or in which the parties are minors or legally incapable, and in all cases of public interest, the Superior Court or the Circuit Court, on the written demand of the parties and of their attorneys *ad litem*, may refer all or any of the issues, either of fact or of law, to the decision of one or more practising advocates, appointed according to the manner determined by the consent.

"343b. The referees appointed who do not accept the office shall be replaced by others, and the majority shall be a quorum.

"343c. Before proceeding they shall be sworn to well and faithfully perform their duties, either before the judge, the prothonotary, or a commissioner of the Superior Court, or the clerk of the Circuit Court, as the case may be.

"343d. The trial before such referees is conducted as in cases without a jury before the court; and the referees shall, for such purpose, have all the powers of such court or judge.

"The referees shall have power to appoint a clerk to assist them.

"343e. All the proceedings in the case are filed in the office of the prothonotary or clerk, as the case may be, of the court of the district in which they are had.

In case they are had in a district other than that in which the case was brought, the record upon the order of the referees shall be transmitted in the manner prescribed by Articles 241 and 242 of this Code.

"343f. The report of the referees shall be in writing and be filed within sixty days after the final hearing of the parties, in the office of the prothonotary or clerk of the court of the place in which the case was pending at the time of the appointment of the referees, in default of which, either party may cause a notice to be served upon the attorney of the adverse party that he intends to end the reference.

"Upon the filing of such notice in the office of the prothonotary or clerk, as the case may be, the case is continued as if it had not been referred.

"However, the proceedings had and proof adduced before the referees form part of the record as if they had been had and taken before the court.

The court may also, upon demand of either of the parties, cancel the appointment of the said referees if they do not proceed with diligence to the hearing of the case.

"343g. On the statement of facts and propositions of law which may be submitted by the parties to the referees, it shall be the duty of the latter to decide what are pertinent to the issue and to note in the report their findings on each.

"The omission to note the same shall not however invalidate the report.

"343h. The referees shall further, in their report, set out the text of the judgment to be drawn up.

"343i. On the application to homologate the report, the court or judge may examine into the grounds of any nullity which may affect the report, but cannot enquire into the merits of the contestation.

"If no ground of nullity be found in the report, the court or judge orders that judgment be entered up by the prothonotary or

clerk, as the case may be, in accordance with the report.

"343j. If the reference is had before three or more referees and their report is unanimous, the judgment based thereon shall not be subject to review by three judges, and the appeal is brought directly to the Court of Queen's Bench.

"343k. In appeal, the court shall inquire into the merits of the contestation as well as the grounds of nullity of the referees' report."

7. The following article is added to the said Code after Article 467.

"467a. In cases of *capias*, attachment before judgment, attachment for rent, conservatory attachment, and in all cases of urgency, the writ may be issued outside office hours without having judicial stamps thereon, provided that the amount of such stamps be deposited with the officer issuing the writ, who is bound to affix the stamps upon the *fiat* as soon as possible."

8. Article 221 of the said Code is repealed and replaced by the following:

"221. The parties may be examined upon articulated facts pertinent to the issue and as witnesses, as soon as the pleas are filed, upon the facts in issue as then joined."

9. Article 573 of the said Code is amended by striking out the word "and" in the first line, and by adding after the word "Montreal" in the same line the words "and of Three Rivers and in the town of Sorel."

10. Article 601 of the said Code is amended by adding after the word "sheriff" the words "or bailiff four days after the sale."

11. Articles 645, 663, 678, 679, 680, 688, 692, 712, 720, 730, 735, 736, 737 and 738 of the said Code are amended by adding after the word "court" in each of these articles the words "or the judge."

12. Article 812 of the said Code is amended by adding thereto the following:

"The Commissioner cannot issue a similar warrant at the *chef-lieu* of a district unless it be established before him by affidavit that it was impossible for the plaintiff or his agent to obtain such writ of *capias* from the prothonotary or his deputy."

13. Article 813 of the said Code is amended by substituting the word "sheriff" for the word "gaoler" in the third line thereof.

14. Article 1335 of the said Code is repealed and replaced by the following:

"1335. He may sell the immovables and shares or stock in manufacturing or financial associations, by following the formalities established by law for voluntary licitations, upon the advice of the parties interested present at a meeting convened for that purpose in the manner prescribed by the judge.

Such sale as respects immovables cannot be had except with the consent of the hypothecary creditors."

PRIVY COUNCIL.

LONDON, March 25, 1885.

Present.—LORD BLACKBURN, SIR BARNES PEACOCK, SIR R. P. COLLIER, SIR R. COUGH, SIR A. HOBHOUSE.

MACDOUGALL, (plff. below), Appellant, and PRENTICE, (plff. below), Respondent.

Partnership—Partition of common property—Indemnity for reduction of share of one partner.

In a division of common property between partners M., one of the partners, agreed to take certain shares as his interest in a transaction, but in consequence of a claim by a third party (which was a partnership liability) these shares passed into other hands and could not be delivered to M. Held, that under the agreement between the partners M. was entitled to have his portion made good out of the partnership assets, and the value of the shares not delivered to him should be calculated as at the time of the partition or agreement between the partners settling their respective rights.

The appeal was from a judgment of the Court of Queen's Bench, Montreal, reported in 7 Legal News, p. 162.

PER CURIAM. The appellant in this case who was the plaintiff below, and the respondent who was defendant, were partners in business. The plaintiff brought his action on the 18th April, 1872, for an account of the partnership affairs, and for the purpose of recovering from the defendant 80 shares in the Canada Lands Purchase Company, or the value of such shares, which the plaintiff put at \$240,000. Upon the partnership accounts, apart from

the shares in question, the plaintiff has been found indebted to the defendant in the sum of \$16,188, and there is now no controversy upon that point. The appeal relates only to the rights of the parties with regard to the shares.

The partnership was formed in February, 1869. One portion of its business was the purchase and sale of mineral properties and the formation of companies, and the profits arising from this source were to be divided in the proportion of three-fourths to the defendant and one-fourth to the plaintiff. In 1870 the partners agreed to purchase the property of the Montreal Mining Company, with the intention of forming a new company to work the mines. The contract was effected partly in Canada by the plaintiff and partly in London by the defendant, but it was completed in London in the name of the defendant and by the defendant with the assistance of Mr. McEwan, who provided the requisite deposit on condition that he should have an equal share in the profits.

The partners then set to work to form a Company who should provide the purchase money and take the property off their hands. After some abortive negotiations, the money was provided by a Mr. Sibley and some others to whom the defendant transferred the benefit of his contract. They projected a company which the plaintiff in his declaration calls the Canada Lands Purchase Company; and it was proposed that the whole property should be represented by 1,600 shares, and that the defendant should be entitled to one tenth of the whole.

In point of fact this Company never was formed, nor were any specific shares, or, so far as appears, any scrip in it issued. But there was a considerable amount of dealing with the interests which the parties had bargained for, and those interests are for the sake of convenience called shares, each share representing one 1,600th part of the whole. Such are the 80 shares for which the plaintiff sued, being half of the 160 apportioned to the defendant.

On the 30th December, 1870, the defendant sold 80 of the shares to Mr. Learned for the sum of \$10,000 American currency, equal to \$9,000 Canadian currency, which the defendant received and did not at that time carry

into the partnership accounts. In consequence of this transaction, or at least very soon after it, the plaintiff made a claim to one half of the profits arising from the purchase and the sale to Sibley and his colleagues. At the end of June, 1871, he filed a bill against the defendant in the Supreme Court of New York County, within whose jurisdiction it seems that Sibley resided and the Company was being formed. It is very difficult to understand the exact ground taken by the plaintiff in this suit. In his declaration he alleges that the defendant had employed him as a broker to negotiate a purchase; that the defendant had sold the property purchased, and had realized as profits the sum of \$22,500, of which the plaintiff claimed half. It is impossible to identify these allegations with any part of the story appearing in the Record. It further appears from the oral evidence that the plaintiff went on to attach the unsold 80 shares, but there is no documentary evidence of such an attachment. It is not, however, necessary to have accurate knowledge of these matters, because the parties settled the litigation by an agreement, the construction of which is the main question on this appeal.

The agreement was effected by three instruments of simultaneous date. The first is a transfer in the following terms:—

"Know all men by these presents that I Edward Alexander Prentice, of the city of Montreal, in the Dominion of Canada, have, in consideration of the sum of one dollar of lawful currency of Canada to me in hand paid by Hartland S. MacDougall, of the same place, and for divers other valuable considerations moving from him to me, do by these presents grant, bargain, sell and assign, to him, the said Hartland S. MacDougall, his heirs and assigns, all and singular the right, title and interest which I, the said Edward Alexander Prentice, now have in and to the undivided one-tenth interest in all the property mentioned in the bond made by the Montreal Mining Company to me, a copy of which bond is hereunto annexed marked 'A,' said interest in said property being now held in trust for me by Alexander H. Sibley, Eber B. Ward, Edward Learned, Peleg Hall, and Charles A. Trowbridge, trustees, as by reference to the indentures, copies of which are hereto annexed marked 'C and D,' will more fully appear, my interest at present remaining in said property being an undivided one-twentieth interest therein.

"To have and to hold the same unto the said Hartland S. MacDougall, his heirs and

assigns, as fully and effectually as I by virtue of the said indenture or in any other manner whatsoever, hold the same, and I do hereby covenant with the said Hartland S. MacDougall, that I have good right to transfer and assign the said interest, and that I will execute such further assurances thereat as may be requisite.

"In witness whereof I have hereunto set my hand and seal, this third day of March, 1871.

"EDW. ALEX. PRENTICE. (L.S.)"

The second is in the form of a letter from plaintiff to the defendant:—

"Edward A. Prentice, Esq.

"63 Wall Street, New York.
3rd March, 1871.

"DEAR SIR,—In consideration of your assignment to me this day of your remaining interest in the property formerly belonging to the Montreal Mining Company and now held by Alex. H. Sibley and other trustees, I hereby agree that my interest therein to the extent of one half of that conveyed by the said assignment, or one fortieth of the whole interest originally held by you shall be liable in said proportion for any damages which may result to you by reason of any suit which Mr. Alexander McEwen of London, England, may institute against you for failure to secure his interest, or any expenses which have been already incurred in the negotiation of the sale of the property by you.

"Yours truly,

"H. S. MACDOUGALL."

By the third instrument the plaintiff purports to assign half his interest to Mr. Ashworth in trust for Miss Auldjo, his assignment being in the same form as the defendant's assignment to himself. It is agreed that Miss Auldjo was a mere nominee of the defendant.

The general effect of the three instruments is that, as between the plaintiff and the defendant, the former becomes the owner of half the then unsold shares, while the latter remains the owner of the other half; that the defendant also remains the owner of the price of the sold shares, and that the plaintiff undertakes that his interest shall meet MacEwan's claim in some proportion, the extent of which has been disputed. Why the parties went through the process of assignment with warranty of one-twentieth interest to the plaintiff, and immediate re-assignment of one-fortieth by him to the defendant through

the form of assignment with warranty to Ashworth and Miss Auldjo, is not clear, but it probably was intended to throw difficulties in the way of MacEwan who was then pressing his claims.

In June, 1871, MacEwan commenced a suit in New York against both the partners and against Sibley and his co-promoters, claiming the whole of the unsold shares as his half of the profits of the transaction, and on the 9th of the following December, he obtained a decree for his whole claim. The partners threatened an appeal, but abandoned it on MacEwan giving back eight shares. After this had been done, all the profits remaining to the partners were these eight shares, and the price of the eighty shares sold. The partnership was dissolved on the 2nd November, 1871, a little earlier than MacEwan's decree, but that dissolution cannot alter the results of the contract of March, 1871. On the 30th January, 1872, the eight shares were placed in the names of Messrs. Shanly and Crawford in trust for the plaintiff and defendant. They are now represented by 288 shares in the Silver Mining Company of Silver Islet, and eight shares in the Ontario Mineral Lands Company, still standing in the same names.

It has been stated that both in the writ of 1871 and in this suit the plaintiff claimed half the interest in the profits of the transaction. The same claim has been advanced on this appeal. But both the Courts in the colony treated it as a partnership transaction, and their Lordships are clear that it was such; that the partnership was both entitled to the profits and liable to MacEwan's claim. The agreement of March, 1871, gave to the plaintiff the same proportion to which he was entitled under the partnership deed.

By decree dated 31st May, 1881, the Superior Court ordered the defendant to pay the plaintiff \$63,811, unless he preferred within 15 days to transfer to the plaintiff 40 of the 80 shares sued for. The Court considered that by the agreement of March, 1871, the defendant had absolutely contracted to transfer 40 shares to the plaintiff, and, having failed to put him in possession of them, must make good their value. It fixed the value as upon the day when the action was commenced, at the rate of \$2,000 a share, and set off against

the \$30,000 so obtained the sum found due from the plaintiff upon the general account.

The defendant appealed to the Court of Queen's Bench, who made their decree on the 23rd January, 1884. They reversed the decree below, directed that the shares held in trust should be divided between the plaintiff and defendant in the proportion of one part to the former and three to the latter, and dismissed the other conclusions of the plaintiff's action. The decree recites that the plaintiff is entitled to his share of the \$9,000 the price of the 80 shares sold by the defendant, and that such share with interest from the 30th of December, 1870, are more than compensated by the \$16,188 due upon the accounts.

From the judges' reasons it appears that they agreed in thinking that the plaintiff was entitled under the terms of the agreement of March, 1871, to 40 shares, which, however, putting the returned eight shares out of consideration, were reduced to 20 by MacEwan's claim, and that for these 20 the plaintiff, not being able to get them, was entitled to compensation. They also agreed that his compensation should not exceed the quarter of the \$9,000, but in their reasons for this opinion they differed. Chief Justice Dorion, looking upon the transaction of that day as a *partage* or a division between partners, thought that the shares must be valued as upon the 3rd March 1871, and were not shown to have been of any greater value than on the 30th December when the sale of the 80 shares took place. The other Judges, whose opinion is delivered by Mr. Justice Ramsay, agreed that the transaction of March 1871 was a *partage*, but they considered that the eviction of a partner from his share necessitated a new *partage*, so that the sole remaining property was to be re-divided according to the partnership deed.

From this decree of the Queen's Bench the plaintiff appeals, contending both that it ascribes to him too small a number of shares, and that it has put them at too low a value. He maintains that the smallest number of shares to which the agreement of March, 1871, entitles him is 40; that if that agreement is held inoperative he is entitled to half the firm's share of profits, and to be indemnified by the defendant against MacEwan's claim; and that the compensation for the shares

which he cannot get should be assessed by taking the value of the shares either on the 9th December 1871, the date of MacEwan's decree, or at the institution of MacEwan's suit, or at the institution of this suit.

It has been already stated that the shares were a partnership asset, and MacEwan's claim a partnership liability, which is inconsistent with the plaintiff's claim to half profits and indemnity. As to the other questions, their Lordships do not find it necessary to decide upon the arguments which were pressed very fully at the bar with reference to the local law by which the contract of March, 1871 ought to be construed, and with reference to the rules of law which regulate warranties upon sales and upon partitions of common property. They think this unnecessary, because the case is governed by a special contract made with knowledge of the causes from which the disputes have sprung, and containing within itself the grounds on which they must be settled.

Their Lordships view the agreement of March, 1871, as calculated to effect three main objects between the parties: first, to divide the 160 shares as a partnership asset would be divided according to the terms of the partnership deed; secondly, in effecting that division to attribute to the defendant's three fourths the whole of the 80 unsold shares; and thirdly, to stipulate that the loss arising from MacEwan's claim should fall on the partners rateably according to their shares. There is no reason to suppose that the defendant's sale of the 80 shares was in excess of his power as a partner, but the plaintiff, whether with reason or without, was contending that the shares were not a partnership asset, and in abandoning that claim he stipulated to have a full quarter of the shares as such. Thus, as between the partners, the plaintiff took his whole interest in shares, giving up his antecedent right to participate in the \$9,000; and the defendant took to the purchase effected by himself, giving up his antecedent right to have three fourths of the shares.

Then comes MacEwan's claim and sweeps away all the unsold shares. The defendant now cannot give the plaintiff any shares; but why? Not only on account of MacEwan's

success, but by the conjoint effect of that and of his own previous sale. If he had not sold the 80 shares, there would have been 80 to answer MacEwan's claim and 80 to divide. Perhaps the position of the parties is kept more precisely in view by dropping the convenient designation of shares and taking up the more abstract and more accurate terms in which they speak of their interests. There were then no separate shares in existence capable of being specifically transferred; the interests in existence were subject to be bought and sold, but were only claims to aliquot parts of an undivided whole. Thus the defendant assigns to the plaintiff all his interest in the undivided one-tenth interest in all the property taken from the Montreal Mining Company, "my interest at present remaining in the said property being an undivided one-twentieth interest therein." And the plaintiff agrees that his interest just acquired by the defendant's assignment, "to the extent of fortieth of the whole interest originally held by you," shall be liable in that proportion to MacEwan's claim. It is not said how the defendant's interest was reduced from a tenth to a twentieth, but it cannot be doubted that the parties were referring to the defendant's sale of the other twentieth; and when the whole interest of the partnership was shown by MacEwan's suit to be only a twentieth instead of a tenth, and so the plaintiff's intended portion was reduced from a fortieth to an eightieth, he became entitled, under the agreement, to have that eightieth made good to him in specie so far as the partnership assets sufficed for it.

This view of the contract tends to support Chief Justice Dorion's opinion as to the eight shares. He says,—“In the view that we take of this case, that the transfer of the 3rd March 1871 constituted a division of common property, these eight shares should be returned to the respondent (i. e., the plaintiff), and thereby reduce his claim for indemnity to 12 shares instead of 20.” Then he goes on to mention reasons which make him think it more equitable to make the decree in the form in which it stands. The reasons point to a desire to alleviate the plaintiff's loss.

Now before pursuing this question further,

or deciding the precise mode of apportioning what remains of the shares, their Lordships ask what practical difference will be made by giving the plaintiff more shares than he takes under the decree. That depends upon the value at which the shares are assessed for compensation to him. His original agreed quantity is 40; of these 18 go to make good MacEwan's claim, and he is not to be compensated for them. The agreed quantity is thus reduced to 22, and the plaintiff is entitled to compensation for so many of them as he does not get in specie. Then the question is, on what basis of value?

Their Lordships cannot accept the view of the Superior Court, that the date of the action is the proper time for ascertaining the value; a view which, if tenable, would give to the plaintiff the power of taking property of a highly speculative and fluctuating character at flood tide, and there fixing the value as the thing he had been deprived of. Nor can they agree with the argument at the bar, that on the 3rd March 1871 the defendant sold 40 shares with warranty of title to the plaintiff, that MacEwan's suit was an eviction of the plaintiff from that property, and that its value must be ascertained either at the commencement of that suit or at the date of the decree in it. It is difficult to say that the transaction was a sale, or that the form of sale with warranty was anything more than a form adopted not to express the exact transaction between the partners but with some other view, or that there was eviction from a property which never was or could be possessed by the assignee. No doubt MacEwan's suit intercepted the claim of the plaintiff to have shares from the Company; but as between the plaintiff and defendant that suit is the very thing which is contemplated by their agreement, and is the subject of special stipulation which does not contain any provision for indemnity to the plaintiff if thereby he failed to get the 40 shares designed for him.

The fact is that the agreement never took effect at all so as to vest in the plaintiff any right to a share in the property, or any possession of such a share. Half the defendant's nominal interest of one tenth really belonged to MacEwan, though that result was not then ascertained. The other half had disappeared

by the sale of the 30th December 1870. The breach complained of was simultaneous with the agreement itself. It seems to their Lordships impossible to say that the value of the property which the defendant purported to assign, but owing to prior events well known to both parties, did not assign, is to be ascertained at any later time than the 3rd March 1871. Some strong reasons might be advanced for taking the value on the 30th December when the 80 shares were sold, but their Lordships will not pursue that view because it would produce the same result as a valuation on the 3rd March.

C. J. Dorion's view is that the shares should be valued on that day, and he goes on to find that the plaintiff, whose business it was to show that the shares were of greater value on that day, has not done so. Their Lordships agree with this finding. From the evidence of Sibley, and of Learned the purchaser of the 80 shares, it is clear that the value of the property was a fanciful one, and subject to abrupt changes. It was not in the market at all. All sales were the result of personal negotiations. Sibley tells us that in March 1871 he bought a few shares at \$800 per share, and the next day was offered \$1,000. When prices can vary 66 per cent. in 24 hours no inference can be drawn as to the prices of one day from those even of the next. And here the evidence does not approach to the 3rd March by, it may be, three to four weeks. Sibley and Learned are both asked the price on that day. Sibley only says that, "in March," the shares could realize from \$500 to \$800. Learned says that he is as unable to give the value of the shares at that as at the present time, inasmuch as it is very fluctuating, and that "two or three months" after his purchase from the defendant he sold several parts for 500 dollars each. Shanley one of the trustees says, "I would not have held stock at any time in this Company for a week, if I had owned any at any time. If I could have got \$10,000 for 80 shares I would have taken it and have been glad to get it." He is speaking of \$10,000 American currency equal to \$9,000 Canadian currency. That is all the evidence bearing on the point.

There is then no difference in point of money whether the plaintiff receives compen-

sation by way of sharing directly in the \$9,000 as the price of shares sold for the partnership, or by way of damages at the rate of \$112.5 per share for those shares which by the terms of his contract he ought to have received, but has not received. If he were to receive more shares, and to be compensated for fewer, there would be a difference. But the difference would not be in his favour, because, even if the shares are worth anything at all, it is not suggested that they are worth anything like \$112.5. The appellant has objected to the decree, not on the ground that it gives him too few shares in specie, but on other grounds which have all failed. The only alteration which their Lordships think might possibly be made in the decree is one so slight that it would amount to an affirmation of the decree, with a small variation adverse to the appellant's interest. As between a decree so framed, and such a possible alteration, their Lordships do not feel called on to decide. It is better to dismiss the appeal.

Their Lordships will humbly advise Her Majesty in accordance with the foregoing opinion. The appellant must pay the costs of the appeal.

Appeal dismissed.

McLeod Fullarton, Q. C., and Cunningham, counsel for appellant.

Partridge & Co., solicitors in London.

Dunlop & Lyman, in Canada, for appellant.

Bompas, Q. C., and Cromwell-White, counsel for respondent.

Balton, Proffitt & Scott, solicitors in London.

R. A. Ramsay, in Canada, for respondent.

APPOINTMENTS.

The Hon. Edmund James Flynn, LL.D., Advocate, Commissioner of Railways, has been appointed to the office of Solicitor-General of the Province of Quebec.

GENERAL NOTES.

The Albany Law Journal laments "the growing and reckless license of the press." "Nothing (it says) is safe or sacred. Knowledge is unnecessary; reason is superfluous; truth is immaterial; sensation is all that is required."

The Legal News.

VOL. VIII. MAY 30, 1885. No. 22.

The act 48 Vict., ch. 21 (Quebec), which was assented to May 9, 1885, makes some changes with respect to Reviews. It enacts:—

1. The following paragraph is added to article 494 of the Code of Civil Procedure of Lower Canada, as replaced by the act 34 Victoria, chapter 4.

"4. From all judgments concerning municipal corporations and municipal offices, on proceedings taken in virtue of chapter 10 of title second of book second of the second part of this code."

2. Article 497 of the said Code is repealed and replaced by the following:

"497. This review cannot be obtained, until the party demanding it has deposited in the office of the prothonotary of the Court which rendered the judgment, and within eight days from the date of such judgment a sum of twenty dollars, if the amount of the suit does not exceed four hundred dollars, or of forty dollars if the amount of the suit exceed four hundred dollars, if the review is taken in virtue of paragraph 4 of article 494, or if it be a real action; together with an additional sum of three dollars for making up and transmitting the record, when the judgment has been rendered elsewhere than in the cities of Quebec and Montreal.

The amount thus deposited is intended to pay the costs of the review incurred by the opposite party if the court should grant them, if not, it is returned to the party by whom it was deposited."

"3. The following article is added after article 500 of the said Code:

"500a. Cases instituted in virtue of paragraph 4 of article 494 have precedence over all other cases."

4. The act 45 Vict., chap. 33 is repealed.

5. This act shall come into force on the day of its sanction.

The decision of Mr. Justice Papineau in *Bessette v. Howard* is noted in the present issue, not because of any novelty in the prin-

ciple laid down, but because the judgment has been widely represented in the press as one which held barbed wire fences to be illegal. As these fences are very extensively constructed throughout the country, a decision condemning them in general terms would have considerable importance. Our report of *Bessette v. Howard*, which, we may remark, has been approved by the learned judge presiding, goes no further than to hold that a person who uses a barbed wire fence about his land is responsible for damages arising from bad construction. It is always difficult to ascertain the precise facts in a case where the evidence is entirely oral, but we understand that in this case the learned judge considered that the wires were too loose and too far apart, and that a mare pasturing in an adjoining field was thus induced to pass through, and sustained injuries in the act of passing.

An international question was initiated lately at Philadelphia. A Captain Hutter arrived at that city from Austria, and anchored at Christian Street wharf. Complaint was made that he was conducting himself in a disorderly way, and a warrant was sworn out for his arrest. When an officer attempted to serve the writ the captain declared that the officer had no authority to be upon his vessel, and had him forcibly ejected. The outcome was at once reported to the Court, whereupon Officer Barlow was given a bench warrant and directed to take Captain Hutter into custody. The chief of police and fifty patrolmen were sent to see that he was protected. When Barlow and the policemen arrived at the wharf Captain Hutter and his seamen were in readiness to receive them, armed with pistols and swords. Officer Barlow was flung overboard, some of the policemen were cut and bruised, but the victory was with the Americans, and the captain was marched to the bar of the Court. Captain Hutter was required to enter security to appear for trial. The trial resulted in his acquittal. Upon the captain's arrival in his own country he made complaint to the Austrian authorities, claiming that he was not amenable to the United States authorities, but had the right to be heard by the Austrian Consul. The complaint having been trans-

mitted to Washington, was referred by the State Department to Judge Ludlow, of the Common Pleas Court. The judge in his reply holds that as the vessel was fastened to the wharf at Philadelphia the commander was directly amenable to the laws and had no right of appeal to the Austrian Consul. The authority of the Court having been set aside and defied, he continues, the Judge was authorized to use all the force necessary to have the process executed.

COUR SUPÉRIEURE.

MONTREAL, May, 1885.

Coram LORANGER, J.

KINLOCH et al. v. T. ROBICHON, N. T. ROBICHON, opposant, et LES DEMANDEURS, contestants.

Tarif—Frais—Opposition.

Le défendeur devait aux demandeurs une somme de \$95; l'action fut commencée par un *capias*. Les demandeurs, conformément à l'usage de la Cour Supérieure du district de Montréal, payèrent sur le bref et sur la procédure en l'action originaire, les déboursés d'une action de \$100 à \$120. Le *capias* fut réglé hors de cour par les parties et jugement intervint en faveur des demandeurs pour la somme de \$95, montant de la dette. Les demandeurs après avoir discuté les biens-mobiliers du défendeur, firent émaner une exécution contre les immeubles. L'immeuble saisi par les demandeurs était évalué à la somme de \$8,000.

L'opposant, N. T. Robichon, fit une opposition à la vente de l'immeuble saisi sur le défendeur, réclamant par sa dite opposition une certaine portion indivise du dit immeuble, comme lui appartenant. La sœur du défendeur, Marie Robichon, fit aussi une opposition réclamant la balance de l'immeuble saisi. Les demandeurs contestèrent les deux oppositions. Jugement intervint, maintenant les oppositions et renvoyant la contestation des demandeurs avec dépens. Le procureur des opposants fit taxer son mémoire sur la dite opposition comme dans une cause de \$200 à \$400, réclamant un honoraire de \$50, conseil à l'enquête, etc. Les demandeurs contestants firent motion pour réviser le mé-

moire de frais du procureur des opposants. Ils alléguèrent que l'action originaire étant considérée comme une action de \$100 à \$120, dernière classe de la Cour Supérieure, l'honoraire sur l'opposition devait être comme de cette classe. Que la cause était en réalité cause à la Cour de Circuit, appellable. C'était le tarif de cette cour sur les oppositions qui devait guider les greffiers dans la taxation du dit mémoire.

Le juge Loranger prit la question en délibéré, et après avoir consulté ses confrères, rendit jugement maintenant les mémoires de frais tels que taxés. L'honorable juge en rendant ce jugement s'appuya sur les articles 1083, 1085, 1086, 1088 et 1089, C. P. C., et jugea que toute la contestation sur l'opposition en question était du ressort de la Cour Supérieure; que la Cour de Circuit dont il était parlé dans les dits articles était la cour qui a juridiction dans les causes au-dessous de \$200, car à l'époque où le Code de Procédure Civile fut promulgué, c'était la Cour de Circuit qui avait juridiction exclusive, dans les districts de Montréal et de Québec, dans tous les districts dans les causes au-dessous de \$200; que l'intention du législateur était par conséquent de faire considérer la procédure sur une saisie d'immeuble comme étant du ressort d'une cour supérieure au-dessous de \$200; que l'on devait payer les déboursés comme sur une action au-dessus de \$200, et que c'était le tarif d'une action de cette classe qui devait régler les frais du procureur.

H. Gtérin-Lajoie, pour l'opposant.

T. C. DeLorimier, pour les demandeurs contestants.

COUR DE CIRCUIT.

MONTREAL, 28 janvier 1885.

Coram PAPINEAU, J.

BESSETTE v. HOWARD.

Responsabilité—Clôture en fil de fer barbelé—Dommages aux animaux.

JUGÉ :—*Que celui qui pour clôturer son terrain fait usage de fil de fer barbelé est responsable du dommage que souffre le propriétaire d'un animal qui s'y blesse lorsque cette clôture n'est pas bien faite.*

Le défendeur employa pour faire sa clôture

de ligne avec un de ses voisins, un nommé Loiseau, du fil de fer barbelé. Le demandeur mit une jument en paturage chez le nommé Loiseau, et l'animal se blessa grièvement sur la clôture en question parce qu'elle était "mal faite, défectueuse et construite de manière à occasionner des accidents nombreux" d'après les allégations du demandeur. De là l'action en dommages pour \$39.00.

Le défendeur plaida que le demandeur connaissait et avait vu la dite clôture sans s'en plaindre, que ce genre de clôture était généralement usitée dans cette Province; et que d'ailleurs, si l'animal s'était blessé, c'était en voulant sauter dans le champ du défendeur.

Le demandeur ayant prouvé qu'il avait souffert des dommages réels au montant de \$36.50, et que la clôture, *telle que faite*, était dangereuse, la Cour jugea que le défendeur était responsable et le condamna à payer cette somme au demandeur avec dépens.

Préfontaine & Lafontaine, avocats du demandeur.

Bethune & Bethune, avocats du défendeur.
(J.J.B.)

COUR DE CIRCUIT.

MONTRÉAL, 23 avril 1885.

Coram GILL, J.

GUIMONT V. LÉONARD.

Lettre d'avocat—Mise en demeure—Demande de paiement.

JUGE : *Que la demande de paiement faite par une lettre d'avocat, dans le cours ordinaire de l'exercice de la profession, est une mise en demeure suffisante et est d'accord avec les exigences de l'art. 1152 du C. C.*

Le demandeur, qui est huissier, réclamait de la défenderesse la somme de \$1.50 pour signification d'une action dans laquelle elle était demanderesse et Joseph Prévost, défendeur.

La défenderesse a contesté cette action et par son plaidoyer allègue :

Qu'elle ne connaissait aucunement le demandeur et avait appris pour la première fois par la signification de l'action en cette cause, qu'il était son créancier.

Que la somme réclamée par le demandeur était quérable à son domicile et que de-

mande ne lui en avait pas été faite avant l'institution de la présente action.

Et elle déposa avec son plaidoyer le montant réclamé, demandant que ses offres fussent déclarées bonnes et valables et l'action du demandeur en conséquence renvoyée, avec dépens.

La preuve démontra que trois à quatre jours avant l'institution de l'action, une lettre d'avocat, demandant le paiement de la somme réclamée en cette cause, avait été adressée à la défenderesse et par elle reçue.

A l'audience, la défenderesse, invoquant l'art. 1152 du C. C., prétendit que la lettre d'avocat qu'elle avait reçue, ne constituait pas une demande de paiement suffisante d'après les exigences de cet article.

Que demande de paiement aurait dû être faite à son domicile, avant l'institution de l'action, par une personne en mesure de lui donner un reçu valable, et qu'elle n'était pas tenue de se déranger pour payer le demandeur.

Que non-seulement l'avocat ne s'était pas rendu à son domicile, mais qu'en loi, il n'avait pas le pouvoir, en cette seule qualité, de lui donner un reçu valable.

Que si l'avocat jouait le rôle de collecteur, il était tenu aux mêmes obligations que le demandeur lui-même et devait se rendre au domicile de la défenderesse et demander le paiement de la somme due.

Qu'à la première réquisition légale qui lui avait été faite, c'est-à-dire lors de la signification de l'action, elle avait répondu par l'offre de la somme réclamée.

Et la cour renvoya les prétentions de la défenderesse et maintint l'action du demandeur, avec dépens.*

Action maintenue.

P. A. Archambault, pour le demandeur.

A. Mathieu, pour la défenderesse.

(J. G. D.)

* Jugé au contraire, le 31 mars 1884, dans un cas analogue à celui-ci, *in re* No. 616, C. S. Montréal, *Smardon v. Lafabre et al.*, Jetté, J. :

Que la lettre d'avocat, même en matière purement commerciale, ne constitue pas une mise en demeure dans le sens de l'art. 1152 du C. C., et que demande de paiement doit être faite au domicile du débiteur par une personne revêtue du pouvoir de donner valable quittance. (Note du rapporteur.)

CIRCUIT COURT.

MONTREAL, April 23, 1885.

Before PAPINEAU, J.

THE WILLIAMS MANUFACTURING COMPANY
v. LALONDE.*Pledge—Rights of owner.*

Held, that the pledge of a moveable, not belonging to the pledgor but held by him under lease, is void as against the owner of the moveable.

The plaintiff issued a *saisie revendication* to recover the possession of a sewing machine manufactured by and belonging to it.

The defendant did not contest the ownership of the plaintiff, but pleaded that the sewing machine in question had been pledged to him for rent by one Charron, his tenant; that he held it à *titre de gage*, and maintained that the plaintiff could not recover the machine without first paying to him the amount for which it had been pledged.

It was proved that the plaintiff was the owner of the machine and had leased the same to Charron; that Charron was a tenant of the defendant, and had pledged the machine with him to guarantee the rent; that he had occupied defendant's premises for three months and left without paying the rent, amounting to some \$18. The machine had never been on the leased premises. In support of his case plaintiff cited 42 and 43 Vic. cap. 18, Que.: *Matthews v. Senecal*, 7 L. C. J., p. 222; *Nordheimer v. Fraser*, 1 L. C. L. J. 92; *Cassils & Crawford*, 21 L. C. J., p. 1; Articles 1488, 1489 and 2268, C. C.

PER CURIAM. By 42 and 43 Vict. cap. 18, Que., the articles 1488, 1489, and 2268, of the Civil Code, relating to sale, are made to apply to the contract of pledge. In the present case a sale of the machine would have been void, the pledge therefore is also void, and the *saisie revendication* is maintained with costs against the defendant.

Archibald, McCormick & Duclos, for plaintiff,
Duhamel, Rainville & Marceau, for defendant.

(C. A. D.)

JURISPRUDENCE FRANÇAISE.

Responsabilité—Accident—Principal locataire—Propriétaire—Défaut de mise en demeure.

Le principal locataire est substitué au pro-

priété d'un immeuble dans le but de veiller à assurer la jouissance et la sécurité des sous-locataires, et il ne saurait dégager sa responsabilité, en cas d'accident résultant du mauvais état de l'immeuble, qu'en faisant la preuve qu'il a mis le propriétaire en demeure d'exécuter les réparations indispensables au bon état de l'immeuble.

(25 août 1884. *Cour d'Appel de Paris. Gaz. Pal.* 8 avril 1885.)

Cession—Transport—Signification—Saisie-arrest postérieure—Refus de paiement au cessionnaire.

En cas de cession de créance, dûment signifiée au débiteur cédé, et dont la validité n'est pas contestée, le dit débiteur n'est pas fondé à se prévaloir de saisies-arrests pratiquées postérieurement entre ses mains par des créanciers du cédant, pour refuser le paiement aux mains du cessionnaire, ou ajourner ce paiement jusqu'à ce que mainlevée des dites saisies-arrests ait été rapportée.

(Cass. 25 mars 1885. *Gaz. Pal.* 11 avril 1885.)

Testament—Legs—Mobilier—Argent placé excepté—Actions d'une société minière—Interprétation.

Si l'interprétation donnée au mot *mobilier* n'est pas absolument impérative, au moins crée-t-elle une présomption qui ne peut être détruite que par des preuves ordinaires, établissant l'intention de la testatrice de restreindre sa libéralité à telle ou telle nature d'objets mobiliers.

La disposition testamentaire par laquelle une femme déclare léguer à son mari *tout son mobilier* doit donc être réputée comprendre les meubles par nature et les meubles par détermination de la loi, notamment les actions d'une compagnie houillère organisée en société civile.

D'ailleurs les dites actions doivent être réputées comprises dans la libéralité alors même que la testatrice aurait déclaré en excepter l'*argent placé*, cette dernière exception ne pouvant comprendre que les *prêts* d'argent faits à un tiers, et tout au plus, peut-être, l'achat de certaines valeurs à *capital à peu près invariable et à intérêts déterminés*, dans

la catégorie desquelles ne rentrent pas les actions ou parts dans une société civile.

(9 mars 1885. *Cour d'Appel de Douai. Gaz. Pal.* 17 av. 1885.)

Incendie—Responsabilité—Propriétaire—Présomption.

On ne peut considérer comme partiellement occupées par le propriétaire, la maison dans laquelle les mansardes sont restées à la disposition de celui-ci pour y déposer certains meubles, alors qu'en fait, ces mansardes n'étaient ni occupées par lui, ni destinées à son habitation.

Par suite, le propriétaire ne saurait, en cas d'incendie, être soumis à la responsabilité devant laquelle disparaît la présomption résultant en sa faveur de l'art. 1734 C. C.

(9 déc. 1884. *Cour d'Appel de Chambéry. Gaz. Pal.* 23 av. 1885.)

Testament authentique—Témoins—Parenté au degré prohibé—1. Legs rémunératoire—Nullité—2. Cassation—Intention du testateur—3. Notaire—Faute—Responsabilité—4. Témoin—Absence de dol—Demande en dommages-intérêts.

1. Celui à qui, dans un testament authentique, est fait un legs rémunératoire, doit être considéré comme un légataire, et son parent ou allié jusqu'au quatrième degré inclusivement est, en conséquence, incapable à ce titre de figurer comme témoin au dit testament (résolu par la Cour d'Appel).

2. Le notaire qui a reçu le dit testament doit être déclaré responsable en cas de cette nullité, alors d'ailleurs qu'il est constant qu'il n'a pu ignorer le lien de parenté existant entre le témoin et le légataire.

Mais sa responsabilité peut être atténuée par cette double circonstance qu'il avait été appelé pour recevoir le dit testament la nuit, en toute hâte, et qu'à son arrivée chez le testateur, celui-ci avait déjà choisi et mandé les témoins instrumentaires.

3. Le témoin dont la parenté avec un légataire a entraîné la nullité du testament, ne peut être déclaré responsable de cette nullité, alors surtout qu'il n'est relevé à sa charge aucune déclaration de nature à tromper la vigilance du notaire.

(31 mars 1885, *Cass.—Gaz. Pal.*, 25 av. 1885).

APPEAL REGISTER—MONTREAL.

May 15.

Beaton & McCool.—Motion for dismissal of the appeal. Also petition to quash writ for insufficiency of security; C.A.V.

Mackill & Morgan.—Petition for appeal from interlocutory judgment; C.A.V.

Bryson & Cannavan.—Motion for dismissal of the appeal; granted as to costs.

Ranson et al. & Vineberg.—Motion for appeal from interlocutory judgment; motion withdrawn with costs.

Massé & Archambault.—Motion for dismissal of appeal; the appellant makes default; appeal dismissed.

Canadian Pacific Railway Co. & Beauchamp.—Motion for dismissal of appeal; granted for disbursements.

Same motion and entry in suits of *Canadian Pacific Railway Co. & Payette*; *C. P. R. & Goyette*, and *C. P. R. & Tremblay*.

McShane & Milburn.—Heard on merits; C.A.V.

McShane & Hall.—Heard on merits; C.A.V.

Johnson & Consolidated Bank.—Submitted on factums; C.A.V.

Angus & Ontario Bank.—Case declared settled.

Fisher & Evans.—Heard on merits; C.A.V.

Exchange Bank & Pichette.—Heard on merits; C.A.V.

May 16.

D'Odé & D'Oreennens & Christin.—Heard on merits; C.A.V.

May 18.

Lord et al. & Davison.—On the principal appeal; motion for leave to appeal to the Supreme Court; C.A.V.

Picard v. B. A. Assurance Co.—Motion by defendants for leave to appeal from interlocutory judgment; C.A.V.

Bury & Silberstein.—Motion for leave to appeal from interlocutory judgment; C.A.V.

Brunet & Corporation de St. Louis.—Heard on merits; C.A.V.

Cross & Windsor Hotel Co.—Hearing on merits commenced.

May 19.

Arpin & Bornais.—Motion for dismissal of appeal granted as to costs. Motion for new security granted by consent.

Lord et al. & Davison.—Petition for leave to appeal to Supreme Court granted.

Farguhar & Normor.—Motion for leave to appeal from interlocutory judgment; C. A. V.

Whitehead & Kieffer.—Motion that inscription for hearing on the merits be struck from the roll as illegal; C. A. V.

Molsons Bank & Lionais et al.—Motion for appeal from interlocutory judgment; granted.

Pinkerton & Collé.—Application to have cause declared a privileged one; C. A. V.

Whitehead & Kieffer.—Motion for *non pros* rejected; costs to abide by the final judgment. Rule against prothonotary not allowed; costs to abide by the final judgment.

Kieffer & Whitehead.—Motion to dismiss appeal; C. A. V.

Whitehead & Kieffer (No. 19).—Application that cause be heard by privilege with No. 49 *Whitehead & White*; C. A. V.

Wheeler & Black.—Motion for new security; C. A. V.

Cross & The Windsor Hotel Co.—Hearing on merits concluded; C. A. V.

May 20.

Jodoin & Archambault.—Motion for dismissal of appeal; granted as to costs.

Ex parte Joseph A. Renaud.—Petition to be admitted bailiff; granted.

Dorion & Dorion.—Motion for permission to appeal from interlocutory judgment; C. A. V.

Whitehead & White.—Heard on merits; C. A. V.

May 21.

Pinkerton & Collé.—Application for precedence refused.

Whitehead & Kieffer.—Application for precedence rejected without costs; motion to reject inscription rejected without costs.

Kieffer & Whitehead.—Motion for dismissal of appeal rejected with costs.

Beaton & McCool.—Motion for dismissal of appeal rejected. Petition to quash writ for insufficiency of security granted, and appeal dismissed *sauf recours*.

Mackill & Morgan et al.—Motion for leave to appeal from interlocutory judgment; rejected.

Bury & Silberstein.—Motion for appeal from interlocutory judgment; granted.

Picard & B. A. Assurance Co.—Motion for appeal from interlocutory judgment; rejected.

McMillan & Hedge & Guillemette.—Judgment confirmed; Ramsay and Cross, JJ., *diss.*

Dominion Abattoir Co. & Hedge & Guillemette.—Judgment confirmed, Ramsay and Cross, JJ., *diss.*

Sharpe & Cuthbert.—Judgment reversed.

Arless & Belmont Manufacturing Co.—Judgment reversed, Cross, J., *diss.*

Tye & Fairman.—Judgment confirmed, Tessier, J., *diss.*

Berthiaume & Normandin.—Petition for appeal from interlocutory judgment; C. A. V.

Stephen & Hagar.—Hearing on merits commenced.

May 22.

Molsons Bank & Lionais et al.—The tiers opposants, respondents, file copy of *désistement* and notice.

Stephen & Hagar.—Hearing on merits concluded, C. A. V.

La Corporation du Séminaire de St. Hyacinthe & La Banque de St. Hyacinthe.—Heard on merits; C. A. V.

Ritchie & Klock & Chamberlin.—Petition for *reprise d'instance*; granted by consent.

Gadoury, fils & Bazinet et al.—Petition for appeal from interlocutory judgment; C. A. V.

Corbett & The Corporation of Huntingdon.—Heard on merits; C. A. V.

Heathers & Forest.—Hearing on merits commenced.

May 23.

Meloche & Park.—Motion for dismissal of appeal; granted.

Heathers & Forest.—Hearing on merits concluded; C. A. V.

May 26.

Farquhar & Normor.—Motion for appeal from interlocutory judgment rejected, Ramsay, J., diss.

Wheeler & Black.—Motion for new security rejected.

Gadoury & Bazinet.—Motion for leave to appeal rejected.

Berthiaume & Normandin.—Motion for leave to appeal rejected.

Roy & G. T. R. Co.—Judgment confirmed.

G. T. R. & Meegan.—Judgment confirmed.

Starnes & Molson & Flynn.—Judgment reversed. Motion for leave to appeal to Privy Council granted.

Molson & Starnes & Flynn.—Appeal dismissed. Motion for leave to appeal to Privy Council granted.

Dorion & Dorion (No. 120).—Judgment reformed, Ramsay, J., dissenting.

Macmaster & Moffatt.—Judgment reversed, Dorion, C.J., and Cross, J., dissenting.

Whitehead & Kieffer.—Motion for order giving provisional possession of the machinery; C. A. V.

Trudeau & La Société de Construction Montarville.—Motion for dismissal of appeal; delay of 8 days allowed appellant to return writ and record.

Jones et al. & Outhbert.—Submitted on facts; C. A. V.

Davidson & O'Halloran.—Submitted on facts; C. A. V.

May 27.

Whitehead & Kieffer.—Motion for provisional possession of machinery rejected.

Walsh & Howard (Quebec case).—Motion for leave to appeal refused.

Carrier & Bender; Bender & Carrier (Quebec cases).—The two judgments are reversed and cases referred to experts; each party paying his own costs in appeal; costs below reserved.

Dorion & Dorion.—Motion for appeal from interlocutory judgment rejected.

Métras & Trudeau.—Judgment confirmed.

Danaëreau & Letourneau.—Judgment re-

versed; condemnation limited to \$1,000, with interest from 15 Oct. 1878.

Western Assurance Co. & Scanlan & O'Connor.—Judgment confirmed.

Sundberg & Wilder.—Judgment confirmed.

Darling & Ryan.—Judgment confirmed.

Berard-Lepine & Corporation of Berthier.—Confirmed.

Corporation of Berthier & Guevremont.—Judgment confirmed, Baby, J., diss.

La Banque d'Echange & Carle.—Motion to dismiss appeal; rejected with costs.

The Court adjourned to 12 noon, June 10.

SIGNING A NOTE OR DEED.

In the story of Ali Baba and the Forty Thieves, it will be remembered that one of the robbers undertook to identify the house to which he wished to lead his comrades by setting a chalk-mark upon the door, and that the scheme failed because Morgiana placed a like mark upon the doors of all the houses in the same street. Now suppose the chalk-mark had signified to the thief that the house was (say) the twenty-fourth one on the right from the corner. In vain would Morgiana have multiplied the mark, the meaning would have remained single; and unconfounded by its recurrence throughout the street the thief would have pitched at once upon the house which he originally had selected.

The story and the supposition will serve to introduce at once the thought of a classification and a natural history of signs.

The natural progress is from things to thoughts, from images and representations to mere identifying instrumentalities. That is, significant by evolution become (mere) signs.

We will take the word 'sign' and consider how it, and the fact it means, with various accessory words and circumstances, more or less closely connected, reveal this progress.

In common idea, to 'sign' a note is to subscribe it, to write one's name underneath. But in law it is not so; the name anywhere is a 'signing,' that is, a marking out who it is that is responsible. And this name marks out who, not because it means the man but merely identifies him, as the chalk-mark did

the door. John Smith originally meant that John who is the smith, now it is no longer a mark of his calling; as Johnson originally meant the man who is the son of John, but no longer does. And as one, out of many doors chalked alike and meaning nothing, can no longer be identified, singled out, so Johnson (and still more John Smith) cannot, as such, be individualised. For, as the grammars say, he 'is a noun of multitude.'

Again, a printed name, one struck by stamp, stencil, or die, is a signature, an identifying mark, for in law the marking out need not be written. Further, not even a name, nor initials, need be used; for a man may make his 'mark'—that is, may hold the pen while a cross is made an evidence of his act of assent. And this cross is itself now an arbitrary unmeaning thing, though in Darwinian phraseology an evidence of survival of a mark once religiously significant; for of old this signature of the cross pledged the faith of a Christian; now an atheist or infidel may so unquestioned sign. A curious survival this of Christianity in the law! I quote Blackstone as evidence: 'Propria manu pro ignorantia literarum signum sanctæ crucis expressi et subscripsi' ('with my own hand, on account of my ignorance of writing, I have made and drawn underneath the sign of the holy cross;') the language written for Caedwalla, a Saxon king, at the end of one of his charters).

Then the seal attending the signature to a deed. The 'seal' is a word survival of *sigillum*; as a figured scroll with the mystic L. S. inside is an ink survival or image of the wax. L. S., the 'signs' of *locum sigilli*, the place where the seal ought to be, but isn't. The charity of legislative over-rulings of the strict common law allows the mystery of the scrolled (and scrawled) L. S., instead of the antiquated necessary wax 'capable of receiving an impression'—that is, of being permanently marked and characterised by the die or signet-ring of the party to be bound. Of old, the seal, the impressed wax, was the only one legal mark, proof of the 'execution' (doing, carrying out to completion) of the 'deed.' And the 'deed' was (to be ungrammatical) the thing 'did.'

You see, the old common law, when kings,

noblemen, and people were more in the way of handling swords than pens, and making marks in blood than in ink, required the mark in the wax as the sign of the deed done; and no signing in the ink way was at all necessary. I give more from Blackstone as evidence: 'The Normans change the work of the scribes (which in England was customarily perfected by golden [illuminated] crosses and other holy marks) into impressed wax, and reject the mode of drawing' (the crosses and marks) 'used by the English.'

Now to return to the word *sigillum*. Notice that this is the diminutive of *signum* (see the first quotation from Blackstone), and so within the completed circle of its history is 'seal' a double, and indeed a triple 'little sign.' First, it is the mark of the deed, the solemn considered act done. Secondly, the thing being used instead of ink, and the name being Latin, not English, it is a mark of the want of education and of the great influence of the Roman clergy (or clerks) who knew how to write, or were supposed to know; and some of whom drew up the 'scribal' portion of the deed. Thirdly, its verbal parent is the very word in Latin from which we have the English word 'sign' at all. Now *signum* further corresponds to the Greek *eikon*, image. So that we see the word 'sign' in its own development demonstrating the principle that the progress is from things to thoughts, from pictures, images, likenesses of the tangible and visible, from representative meanings, to symbols, unmeaning marks, of some thing.

The word 'sign' has now done (as Humpty Dumpty in the Alice Book would say a fair day's work; will therefore be dismissed the Court.

We started with signing a note. Consider the word 'note' a little. Commercially this stands for a promise to pay, and also the paper on which the promise is written. But in law the note is neither the paper nor the promise (in strictness); it is the evidence, memorandum, mark of the promise. *Nota* (note mark). *Nosco*, to know; *Notum*, the known. *Nota* is thus the known mark of a known thing—its characteristic. This last word, in turn, is from the Greek *charasso*, to cut, to cut a mark. Character is the cut which is deeply marked, so as to be remarked. And so the mental and moral qualities of a man constitute the mark of that man. Such is the progress from things to thoughts, from the physical to the metaphysical. Yet reversion, as it may be termed, often occurs; thus commercially the note is not the memorandum of an agreement simply—but the writing or even the paper written; the transfer of idea here being from thoughts to things.—J. B. Wood in *Albany Law Journal*.

The Legal News.

VOL. VIII. JUNE 6, 1885. No. 23.

Kentucky has had a curious will case. A person by the name of Likefield seems to have been under the impression that if he died at all he would die away from home, and he made his will in these terms: "If any accident should happen to me that I die from home, my wife shall have everything I possess." He lived for many years and finally did not die "from home." But he had preserved the old will and read it within a year of his decease. The Court of Appeals, (*Likefield v. Likefield*) holds that the testator's dying away from home was not a condition precedent, and that the wife was entitled to the estate under the will. There were some adjudged cases which seemed to point to a different conclusion. Thus in *Parsons v. Lanoe*, 1 Ves. Sr., 190, the words "If I die before my return from my journey to Ireland," were held to constitute a contingent will, and an inoperative one because the maker returned home. "In case I die before I join my beloved wife," shared a like fate in *Sinclair v. Hone*, 6 Ves. Jr. 607. The Kentucky Court say: "The will in this instance fixes no limit or time, as during a particular journey, or for a particular length of time. It refers to no particular expected calamity, and the words are general in their character. It is shown that the testator carefully preserved the paper, and that he examined it the year prior to his death."

Of the case of a cabman receiving a sovereign for a shilling, and keeping it (noticed on pp. 105, 122 of this volume), the *St. James' Gazette* says: "If a sovereign is given to a cabman by his fare, both parties believing it to be a shilling, and an hour later the cabman discovers the mistake and keeps the sovereign, has he stolen it? The argument of this question before the Court for Crown Cases Reserved last week afforded excellent entertainment to a professional audience. The difficulty is, that to 'take and carry away

animo furandi' is an essential part of the common-law definition of larceny, and that in this case the cabman did not form a felonious intention about the sovereign when he took it and carried it away, because he then believed it to be a shilling. On behalf of the Crown it was argued that either he took it when he knew it was a sovereign, or the felonious intention which he subsequently formed relates back to the time when he took it. Before the argument had gone far it was apparent that the five judges who were hearing the case were not agreed, and while Lord Coleridge had no doubt that the sovereign was stolen, Mr. Justice Stephen was equally positive that it was not. Mr. Justice Cave further complicated matters by throwing out a suggestion that the cabman might have committed the statutory offence called larceny by a bailee. In the result the Lord Chief Justice announced that the Bench was so seriously divided in opinion that there must be a further argument before the full court—that is the whole Queen's Bench Division; so that the frequenters of the law courts will again be gratified by the most impressive legal spectacle left to us in these prosaic days, that of twelve or fourteen judges all sitting together to decide a question of criminal law."

At a late dinner of the Boston Bar, Judge Oliver Wendell Holmes (son of the Professor) grew enthusiastic over the work and scope of the profession. "The court and the bar," he said, "are too old acquaintances to speak much to each other of themselves or of their mutual relations. I hope I may say we are too old friends to need to do it. If you did not believe it already, it would be useless for me to affirm that in the judges' half of our common work the will at least is not wanting to do every duty of their noble office; that every interest, every faculty, every energy, almost every waking hour is filled with their work; that they give their lives to it, more than which they cannot do. But if not of the bench, shall I speak of the bar? Shall I ask what a court would be, unaided? The law is made by the bar, even more than by the bench; yet do I need to speak of the learning and varied gifts that have given the bar of this State a reputation throughout the

whole domain of the common law? I think I need not—nor of its high and scrupulous honor. The world has its fling at lawyers sometimes, but its very denial is an admission. It feels what I believe to be the truth, that of all secular professions this has the highest standards."

"And what a profession it is!" he continued. "No doubt every thing is interesting when it is understood and seen in its connection with the rest of things. Every calling is great when greatly pursued. But what other gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life—so share its passions, its battles, its despair, its triumphs—both as witness and actor? But that is not all. What a subject is this in which we are united! This abstraction called the Law, wherein as in a magic mirror we see reflected, not only our own lives, but the lives of all men that have been. When I think on this majestic theme my eyes dazzle. If we are to speak of the law as our mistress, we who are here know that she is a mistress only to be wooed with sustained and lonely passion—only to be won by straining all the faculties by which man is likeliest to a god. Those who, having begun the suit, turn away uncharmed, do so either because they have not been vouchsafed the sight of her divine figure, or because they have not the heart for so great a struggle. To the lover of the law, how small a thing seem the novelist's tales of the loves and fates of Daphnis and Chloe. How pale a phantom even the Circe of poetry transforming mankind with intoxicating dreams of fiery aether and the foam of summer seas and glowing greensward, and the white arms of women! For him no less a history will suffice than that of the moral life of his race. For him every text that he deciphers, every doubt that he resolves, adds a new feature to the unfolding panorama of man's destiny upon this earth. Nor will his task be done until, by the furthest stretch of human imagination, he has seen as with his eyes the birth and growth of society, and by the furthest stretch of reason he has understood the philosophy of its being."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

QUEBEC, May 8, 1885.

Before DORION, C.J., MONK, RAMSAY, CROSS, and BABY, JJ.

FRASER (plff. contesting in court below), appellant, and JONES (opposant below), respondent.

Legacy—Sale of object bequeathed—Marriage in North West Territory

1. *The sale of the object bequeathed under pressure of urgent necessity did not, prior to the Code, imply an intention to revoke the legacy.*
2. *Evidence of long cohabitation of a white man and an Indian woman in the North West Territory, the woman never having received the title of wife, will not establish a valid marriage.*

Connolly v. Woolrich (11 L. C. J. 197) distinguished.

RAMSAY, J. The appellant brought an action against the curator to the vacant estate of the late Alex. Fraser to render an account to appellant, a special legatee under the will of Alex. Fraser, of the sum of £9,800, being the balance of the price of sale of two seigniories, Temiscouata and Madawaska, portions of which had been bequeathed to appellant, but had been subsequently sold by the testator. The respondent, Jones, was made a party to this suit, and he specially pleaded, that he was the legitimate son of Marguerite Fraser, who was the legitimate daughter of the late Alex. Fraser and Angelique Meadows, an Indian woman to whom Fraser had been married according to the Indian custom in the North-west Territory; that the legacy to appellant was revoked by the sale of the seigniories, and that in right of his mother he, the respondent, was entitled to one half of the balance of the price of sale.

On these issues the parties were heard before Chief Justice Meredith, who dismissed the exception on the ground that under the law of Canada as it stood when Alex. Fraser's will was made, and at the time of his death,—and indeed until the alteration of the law by the Civil Code, the sale of the object bequeathed was only a presumption that the testator had changed his intention, which

presumption might be and has been rebutted. The judgment, therefore, ordered Pouliot to account, and he deposited in Court \$50,015.07. A project of distribution was then made collocating Fraser. To this respondent filed an opposition, setting up the same grounds as he had raised by his defence to the action, with the further allegation that by the Indian marriage, A. Fraser being a domiciled Lower Canadian, community of property was established by law between him and Angelique Meadows, and that therefore Jones had a right through his mother, to one-fourth, that is one-half of Angelique Meadows' share of the community.

There is also another question to which it is unnecessary for the moment to refer.

This contestation, so far as explained, was met by several counter pretensions. It was said that the whole matter had been litigated between the parties, that a judgment had been rendered against the opposant from which no appeal had been taken, and that there was *chose jugée* between them on the whole contestation. It was further contended, as before, that the bequest was not revoked, that there had been no marriage between Alex. Fraser and the Indian woman, and that if there had been such a marriage it could not give rise to community.

We have therefore to inquire, (1) whether under the circumstances, the sale of the object bequeathed, by the law of Canada prior to the Civil Code, implied the intention to revoke the legacy. (2) Whether there was a valid marriage between Alexander Fraser and Angelique Meadows. (3) Whether, admitting there was a marriage, it gave rise to community of property between them. (4) Whether all or any of these questions could be again argued by respondent against appellant.

I shall take the last of these questions first. Our law is expressed in general terms in Art. 1241, C. C. It would have avoided perplexity if the article had not been drawn with a view to originality. It differs from the article 1351, C. N., and also from Pothier's analysis, Ob. No. 888. As it appears to be the old law the legislature intended to embody, I shall take Pothier's version as the expression of that intention. We have first the principle,

that to invoke successfully *res judicata* the new demand must have the same object as the former demand, of which the defendant has been absolved. The constituents of this requirement are three in number: 1. The same thing. 2. The same cause of action. 3. And the same qualities both of plaintiff and defendant. If any one of these three things is lacking, there is no *res judicata*. In the case before us do they all exist? With regard to the first question it seems to me that the decision of Chief Justice Meredith, from which there has been no appeal, is final, so far as it goes. It was contended that it was not a final, but an interlocutory judgment, because it was not absolutely the last judgment to be rendered in the case. This, however, is not the real distinction between final and interlocutory judgments. To avoid repeated and unnecessary appeals, judgments final by their nature are considered as interlocutory, although they are improperly so called; but no judgment on the merits, on which there has been a full hearing is interlocutory in the sense that it can be modified by the Court later. The difference between a final judgment and an interlocutory is that the former is a sentence determining the right, whereas the latter only prepares the way for its determination; 2 Cujas, 491 D. The latter can be altered, not the former, and so it has always been held, that a judgment deferring the oath cannot be altered, while a simple ruling at enquête can be altered. Toullier X, 116, 7. I think that the judgment of the Superior Court was a sentence, and therefore that the Superior Court had no authority to hear the question anew on the opposition.

Chief Justice Meredith, however, did not adjudicate on the second point, because, as it stood, it was of no importance whether Alex. Fraser and Angelique Meadows were married or not. Not having adjudicated on the point, in fact the issue not being fully before the Court, I don't think it possible to hold that there is any *res judicata* as to the question of legitimacy and the effect of the Indian marriage, if it took place.

But if I had to decide upon the merits of the first point, I concur in the able argument of the learned Chief Justice in the Court below so fully, that I should have only one

remark to add to what he has said. It seems to me that the institutes state the abstract principle of the old law precisely. It is this, the intention of the testator in disposing of the thing bequeathed is to be gathered from all the circumstances, and the digest gives as an instance, not exclusively, a sale by urgent necessity.

It does not follow that this necessity was necessarily starvation or personal discomfort and distress. In a sense Fraser was a rich man; but a large part of his property was unprofitable, and likely to remain so for years, and he was hampered by his debts. Unexpectedly this property rose immensely in value, and he was offered a great price for it which would clear him of all embarrassment, and he sold. That is to say, he sold owing to a change of circumstances, which did not in the least affect any motive he had in making his will. The will shows a careful provision for all his children, all of whom he evidently believed to be illegitimate. He was himself illegitimate, and he had no heirs but the Crown. Is it to be presumed that he intended to make the Crown the heir of this windfall? I think not, and I attach great weight to the presumption arising from his having disposed of all his property by his will, and from his knowing that what he did not bequeath would go to the Crown, that he did not intend to alter his will as regards these seigniories.

As to the condition of financial distress in which Alexander Fraser was before the sale of the seigniories, it is hardly necessary to go very minutely into the examination of the accounts he owed, for on the 2nd April, 1862, the respondent, his brother and sister found it their interest to address a petition to the Governor-General relative to this succession of their father, and very particularly referring to the £9,600 in question, and they distinctly enunciate the fact that "*le dit Alex. Fraser avait des dettes considérables, et était même considéré comme pauvre*"; and they then go on to say that, by the sale of the seigniories of Temiscouata and Madawaska for £15,000, "*il put ainsi libérer ses seigneuries de la Rivière du Loup, Villeraie, Terrebois et LeParc d'une partie des dettes dont elles étaient grevées.*" This was intended to

convey to the Governor-General the idea of a sale under the pressure of urgent necessity, and it appears the representation was effectual. The Solicitor-General for Lower Canada gave an opinion in which he says: "1st, that the sale by the said Alex. Fraser, took place under circumstances of urgent necessity, that is to say, at a moment when he was greatly involved in debt, and that as there appears no indication of the intention of the testator to revoke the bequest made of the property so sold, the legacy has not lapsed, but remains in full force and virtue, and that consequently the £9,600 cannot be claimed by the Crown." The committee concurred in this opinion and advised that the same be approved and acted on. Having thus obtained the abandonment of the claim by the Crown, on the ground that the legacy had not lapsed, the sale having been made under the pressure of urgent necessity, the repeated attempt to have the legacy declared void, on the ground that the sale of the seigniories was without necessity, and that Fraser was, at the time, a rich and an unembarrassed man, looks a little audacious. We have also Alex. Fraser's own declaration that the payment of his debts with part of the money coming from the sale was "a great relief" to him. (Letter, 3rd Sept., 1835.)

We next come to the question of the alleged marriage, which becomes of importance, as the respondent claims one-fourth as heir of his mother. I take it, this is a question principally of fact. There appears to be no serious difference of opinion between the parties as to any proposition of law, save one. Respondent does not contend that the burthen of proof is not on him; but he argued that it was not necessary to produce a register of marriage, that the absence of any such register being established, the marriage could be proved by witnesses, and that it was sufficient, to establish a marriage, to show possession of the *status*—that is, that the wife bore the name of the husband, that he treated her as his wife, educating and bringing up the issue as his lawful offspring, and repute. It was also contended that the declarations of the man and woman are evidence of the marriage, or, at all events, of these facts.

I did not understand that these propositions were disputed, nor do I understand that the respondent contends that cohabitation alone will create the presumption that there was a marriage. The general doctrine of the civil law is clear. *Matrimonium inter virum et mulierem contractum fuisse non presumitur et qui ergo asserit inter aliquos contractum fuisse matrimonium probare id debet. Cum autem altero de duobus modis probari soleat celebratum matrimonium veris scilicet et presumptis probationibus etc. Menochius de Præs.—* Libr. 3, Pr. 1, No. 1, No. 10.

Evidently it is one thing to say there was actually a marriage, and quite another to say that a marriage will be presumed from the possession of *status*.

Respondent alleges both. He neither relies wholly on the marriage, which he alleges, and which, to say the least of it, is peculiar, nor on the possession of *status*, which possesses characteristics to some extent unusual; but he says: "There was a marriage between my grandfather and grandmother according to the custom of the barbarous tribes amongst whom they were living; none other was possible. Therefore this marriage was sufficient, and the proof of our cohabitation having the binding effect of marriage is to be found in the possession of the *status* of wife by my grandmother." It is this that gives rise to the sole question of law on which the parties appear to me to be disagreed. Appellant's pretension is that the very nature of the relation between Alexander Fraser and this Indian woman, far from creating a presumption of marriage, destroys such presumption and fully explains his cohabitation with her, and his whole treatment of her. If Mr. Alex. Fraser, being interrogated seriously on the matter, had answered: "I went to the wilds of the North-West a young man and unmarried, I was surrounded by savages, and I cohabited during all the years I was there with this woman; I had several children by her; I treated her well, and when I left I brought her down here with our children; I provided for them both as well, and better perhaps than I could afford, but I never was married to her," the statement would have readily been accepted as a reasonable, if not entirely

a satisfactory account of the relations existing between him and Angelique Meadows. Morally speaking, it is not satisfactory. Is it one the law will adopt? is a question we shall shortly have to examine.

In the meantime, let us turn to the facts. Those sought to be established are the marriage absolutely, or the *possession d'état* from which a marriage may be presumed. It is not disputed that the characteristics which determine the *possession d'état* are name, treatment and repute. There is no evidence of the custom as respects marriage in the tribe to which Angelique Meadows belonged, or indeed any evidence of a marriage at all, except in the alleged declarations or admissions of Fraser himself and of the Indian woman. Fraser's admissions are sought to be proved by nine witnesses. Two of them, Benjamin Michaud and George April, relate stories that Fraser told them as to his marriage; but the stories are totally dissimilar. He was evidently telling these people travellers' tales, which should, to a certain extent, justify his *liaison* with this woman. There was nothing serious in what he said. The respondent also brought up one Paul Morin to tell a story of a conversation with a *commis*, whose name is not given. This does not appear to me to be evidence; but, if the respondent relies upon it at all, it contradicts both the story of Michaud and that of April. Again, we have the statement of a grandchild of this connection, Ignace Beaulieu, who relates that his grandmother told him that she was not like Pauline, but that she was married to Fraser. "C'est les bourgeois qui nous ont mariés," etc. The other testimony on the point is that Fraser called her his wife: *sa sauvagesse, la bonne femme, la grande-mère*, and one witness says he called her "sa dame" by way of distinction. In the absence of *possession d'état* does this establish a marriage? We might perhaps be willing to admit that there might be a binding contract by the consent of the parties, where no religious ceremony is practicable, although I very much doubt this, in any country in which the rules of the Council of Trent took effect. Of course, those rules prevail here; for no different law being pleaded, we must presume that our law exists in the North-

west. Now our law is composed of the public law of England, and the municipal law of France; and the public law of England and France in these matters being almost identical, it is unimportant to inquire whether this is to be governed by public or by municipal law. If we were to presume that any other law than that of this Province existed in the North-west, we should be obliged to say it was that of England, which no more than ours recognizes a natural marriage. If, however, we were to give the fullest effect to consent, as being the one thing essential to marriage, for that is really the doctrine relied on, to what must the consent extend? Certainly to something more than co-habitation. Although evidence of co-habitation may go to establish status, it is not marriage.

The marriage, which the law recognises as binding, is a bond indissoluble at the will of the parties. "*Non est in conjugum potestate dissolvere matrimonium.*" Men. Ib., No. 10. Some allusion has been made to the law of Scotland, and the well-known case of *McAdam & Walker* was referred to. That was a very striking case. McAdam formally before his servants, called into a room for the purpose of being witnesses, declared his marriage with Walker, who ratified it. He went into the next room and blew out his brains. This was held to be a valid marriage by the law of Scotland, which rejects the rules of the Council of Trent.

In the case before us it seems to me there is no evidence of any such contract. Much has been said of the local custom, but there is not a word of evidence as to what that custom was. Nor am I prepared to accept the proposition that the co-habitation of a civilized man and a savage woman, even for a long period of time, gives rise to the presumption that they had consented to be married in our sense of marriage. "*Requiritur secundo quod vir et mulier pares sint.*"

This brings us to the presumptions arising from Fraser's conduct when he left the wild north-western territory and returned to Lower Canada. Did he give Angelique Meadows his name, did he treat her as his wife, had she the reputation of being his wife? We are told by respondent's witnesses that Fraser, the Indian woman and the half-

breed family came down together, and also that Fraser came down and that they followed. Respondent, by his factum, seems to give credit to the latter story; p. 1, l. 12. We are also told by several of respondent's witnesses that, after they arrived at Rivière du Loup, Fraser and Angelique Meadows did not live in the same house, and that they never lived together there. Towards the close of respondent's *enquête*, a witness, Cyprien Guichard, is produced, who tells us "cette dame de Monsieur Alexandre Fraser restait avec lui dans la grande maison bléne sur la côte; je ne l'ai pas vue ailleurs que là." And he adds: "Personne ne savait si Monsieur Alexandre Fraser était marié." * * * Il était marié, après le dicton du monde, il était marié, pas comme on se marie, nous autres," etc. Giving the fullest weight to this testimony, the witness, when twelve years old, had been four or five times to Fraser's house in the early years of his stay at Rivière du Loup and saw the Indian woman there. He never was there after. Now, however these facts may be, it is perfectly certain that shortly after the arrival of the Indian family at Rivière du Loup, a separate house was built for her and her family, and they always afterwards lived apart from Fraser. It is true he provided for all their material wants, he constantly sent them food and he educated the children, but no writer pretends that treatment of that sort indicates *possession d'état*, by the woman, as wife. "*Requiritur quod vir ipse pertractet mulierem honorifice, eo scilicet modo, quo uxores pertractari, et haberi solent.*" "*Requiritur ut habitatio sit in una eadem que domo: non autem sufficeret, quod vir habitaret in solita sua domo, ut puta in paterna, et mulier in domo conductitia.*" "*Requiritur ut si ita cohabitantes, coram testibus declarant, se cohabitare tanquam conjuges.*" (Men. Ib. Nos. 74, 75, 76.)

The respondent has totally failed to prove that the Indian woman bore Fraser's name. To her face she was called "Madam Fraser," but generally "la sauvagesse" or "la sauvagesse à Mons. Fraser," was the appellation she received. Fraser himself never called her Mme. Fraser; and in no document does he give her his name. In the will in question he gives her an annuity as "Angelique Mea-

dows." In the registry of baptism, the name given to the mother is her maiden name. It is said that this is all the law requires, and that the officiating clergyman has no right to insert anything he is not obliged to insert. It certainly would not have been a trespass had he given to the wife her husband's name, which he did not do, because it was not given to him, we must presume. This, then, is a very solemn occasion on which F. refused this woman his name.

As to repute, common report, rumour or fame, call it which you will, there is a great distinction to be made. Rumour or fame may be words spread abroad without any authority, owing its origin to malice, and its acceptance to credulity; or, it may be, a common opinion made known by words, and arising out of some grounded suspicion or indication. Now it appears to me that it is impossible to read the deposition of the witnesses produced by respondent without being struck with its artificial and unauthoritative character. It is based upon no indication but that Fraser and Angelique Meadows had lived together and had children, and the hearsay marriage, according to the unproved Indian custom. In other words, the witnesses begged the whole question. Here, then, are people who avowedly know nothing of the marriage, and who saw no conclusive signs of the existence of a marriage, seeking to impose their idle and irrelevant gossip on the court under the guise of evidence. This is the rumour which the juriconsults call, "*falsus sermo*," "*et qui certum nuntium atque auctorem non habet*."

By the testimony produced by the respondent, opposant in the Court below, it appears to me that there is no evidence of the three characteristics of *possession d'état* now insisted upon by him. Leaving aside, for the moment, the question of prescription, let us add to what precedes the fact, that the respondent has allowed the intermediate generation almost to pass away, before he comes to claim as a novelty, in right of his mother, this *status* which, if the testimony of his witnesses means anything at all, she always enjoyed. It seems incredible that anyone could believe such a pretention.

But now let us turn to the evidence adduced by the appellant. The general repute of the

illegitimacy of all Fraser's children, and that he never was married at all, is attested by Henry Davidson, Telesphore Michaud and Xavier Laforest, in quite as positive a manner as any of the witnesses who have testified to the marriage, and it is supported by indications which it is not easy to explain away. We have seen Fraser never called Angelique Mme. Fraser to anybody that can be produced; that he did not give her his name before the Presbyterian minister at Quebec in 1801. Before her death she had become a Roman Catholic, and she was buried at St. Patrice, where a regular register was kept, and no one thought of saying the deceased was the wife of Fraser. She is described as "Angelique, sauvage, native des pays du Nord-Ouest." To pretend that this was the certificate of burial of the Seignior's recognized wife is to presume on unbounded credulity.

Fraser died in 1837. The difficulty as to the will, owing to the sale of the seigniories, was perfectly known. The opinion of counsel was taken, and on his opinion a *partage* was agreed upon without any one dreaming of contending that Angélique Sauvage, native des pays du Nord-Ouest, "was the legitimate wife of the testator. But respondent says he is not bound by this *partage*, to which he was not a party. That may be, but that is not the question for the moment. Whether it binds the respondent or not, it is at all events an act of all the persons who could act, and it assumes as incontrovertible that Fraser was never married. As to the pretention that respondent never acquiesced in this, it is not exact. Over and over again, he took money under this arrangement and gave receipts. Of course this may be error, and he may be relieved from it; but that is not what he seeks. If he has acquiesced in this *partage*, he should have it set aside. He has no right to hold to the bad title and get another incompatible with it.

But did he make a mistake about the share falling to him? On the 2nd April, 1862, the respondent, his mother and sister, made the petition to the Governor-General, already mentioned, praying him to renounce, on the part of the Crown, to any pretention that the alienation of the seigniories annulled the

legacies. In that document the petitioners thought it necessary to set up what they then, having arrived at majority, considered was their *status* and that of their grandmother, and they allege :

"Que pendant son séjour dans le Territoire du Nord-Ouest il contracta *alliance, suivant les usages de ce pays, et vécut maritalement avec une femme de ce pays*, nommée Angélique Meadows, de laquelle il eut cinq enfants savoir; Angélique, plus tard la femme de Sieur Ignace Beaulieu, Alexandre, Marguerite, mère de vos pétitionnaires, John et Mary qu'il amena avec lui, ainsi que leur mère à la Rivière du Loup, en Canada."

"Que la dite Angélique Meadows, ayant, à son arrivée en Canada, été instruite des vérités et de la doctrine de la religion Chrétienne et *des lois du pays*, cessa de vivre avec le dit feu Alexandre Fraser, et se sépara de lui."

"Que le dit feu Alexandre Fraser vécut alors avec une autre personne, de laquelle il eut plusieurs autres enfants naturels, dont cinq sont encore vivants."

* * * * *

"Que le dit feu Alexandre Fraser ne s'est jamais marié."

"Que lors de son décès, le dit Alexandre Fraser n'avait, soit dans ce pays ou ailleurs, aucun héritier ou représentants légaux."

In the absence of any evidence of marriage, this is decisive. It is an unqualified admission, and it is a subject about which the respondent could not be in error.

If conversations of fifty years ago were to be relied upon (they are the whole of respondent's evidence), it would seem that Angélique had a husband according to some custom when, it is pretended, she married Fraser.

Commentary is useless. I do not think it necessary to examine the question of prescription. The law is laid down in Art. 236, C. C. It has been contended that this article does not express the old law, and that respondent was not seeking to regain his *status*, but to take advantage of it; that this could not be prescribed, and that his title was the certificate of baptism. It seems to me that these interesting speculations can only arise

on facts very different from those submitted for our consideration.

Great importance has been attached to the case of *Connolly and Woolrych*. That case seems to me to be very easily distinguished from this one. The judge found, as a fact, that there was a marriage, there was cohabitation for a considerable period of time in Lower Canada, and there was a formal declaration by the deceased Connolly that he was married to the Indian woman, made to the priest who baptised his children. It is sufficient to say this to explain the opinion at which I have arrived in the case before us, without any special reference to that case; and although I have read the report of it with great care, I do not feel called upon to express either approbation or the reverse of the long and able opinion of the learned judge who delivered the judgment in the Superior Court.

The remaining question is as to the distribution to the legatees under the will. Respondent claims on the whole \$60,000, and he contends further, that, in so far as he represents his mother, he is not liable for the debts of the testator; or, in other words, that his share of the sold seigniories should be represented by so much of the price of sale, and not of the balance. I have only to say that I entirely concur with the learned Chief Justice on this point.

Judgment reversed, Monk, J., *diss.*

Larue, Angers & Casgrain, for appellant.

Geo. Irvine, Q.C., counsel.

Tessier & Pouliot, for respondent.

GENERAL NOTES.

The Supreme Court of the United States, from October, 1884, to May 4, 1885, delivered 272 opinions. Number of cases affirmed 199; reversed 97; dismissed 39. Number of cases remaining undisposed of 861.

Life Insurance is the great American fraud; and the only difference between the two systems—the regular and the co-operative—is the difference between two frauds. In both of them a fool trusts his cash to a man of whom he knows nothing, without security.—*Central Law Journal*.

The *Law Times* (London) criticizes the use of the phrase "pass upon," in the sense of decide or adjudge, and calls it an "unpleasant American phrase." On which the *Albany Law Journal* observes: "And yet it is used by Shakespeare and Jeremy Taylor, and we venture to say never until now has been condemned except by some philological pedant."

The Legal News.

VOL. VIII. JUNE 13, 1885. No. 24.

Among recent acts of dishonesty by bank officials that of Scott, who stole \$160,000 in one day, stands out conspicuously. President Baldwin, of the Fourth National Bank, is reported to have said in reference to this case: "There is no way of preventing such thefts, so far as I know. If a bank officer is dishonest and determines to steal, there are no checks that will hold him. It is a matter to which much thought has been given by bank presidents and directors, and there have been many conferences to discuss the possibility of providing further safeguards. No system of book-keeping or supervision human ingenuity has yet devised will prevent theft. How easy it would be for a dishonest teller to put this little parcel in his pocket! You see, it is only about an inch and a half thick, but it contains a million dollars in gold certificates." It is no slight scandal to our modern system of international arrangements that the exchange or surrender of embezzlers and thieves has not been provided for before this. With the most intimate relations of railway traffic, telegraphy, journalism, etc., we still go on affording a convenient refuge for persons fleeing from the justice which would be dealt out by the proper tribunals of the fugitives. Banks and shareholders are deeply interested in terminating this unsatisfactory state of things, and a united effort should be made to adopt an efficient treaty.

Popular opinion does not seem to stand in the way at present. For instance, we find a journal like the *N. Y. Herald*, which usually indicates the feeling of the masses, publishing the following observations:—"The fact that a bank has no safeguard but honesty against theft by its officers is due to the lack of a proper extradition treaty between the United States and Great Britain. As President Baldwin says, a teller may put a mil-

lion dollars in his pocket and leave the bank after the close of business without suspicion. He goes to the Grand Central depot, takes the evening train and reaches Montreal the following morning. His flight is not suspected nor the stolen money missed until he is safe in Canada, beyond the reach of our criminal process. In this condition of the law it is true that a bank has no protection but honesty against theft, and the ease and certainty of escape present a temptation that is a severe strain on honesty. But with an extradition treaty providing for the surrender of the criminal there would be an effective safeguard against dishonesty. No bank teller will commit a theft to-day which must be discovered to-morrow if he knows that arrest, conviction and imprisonment as a felon in State Prison are certain to follow quickly upon discovery. If embezzlement, stealing, &c., were extraditable offences, the fugitive would no more escape our criminal law in Montreal than in Chicago. We suggest to bank presidents and directors that they urge upon the State Department at Washington, as the *Herald* has long done, the importance of a new extradition treaty with England."

On the result in the Mignonette case the *Law Times* (London) observes:—"The commutation of the sentences passed on Dudley and Stephens marks one of those illogical compromises which seem to be of the essence of English procedure, whether legal or political. The inconsistency of sentencing a man to death with solemn formality on Monday, and mitigating the sentence to a brief term of the mildest form of imprisonment on Saturday, has naturally provoked a good deal of more or less intelligent criticism, and is certainly a proceeding not altogether calculated to exhibit the law in a dignified light. . . . We are far indeed from desiring that the law should depart from its stern indifference to 'extenuating circumstances;' but when the law has discharged its function by adjudging a prisoner guilty, it might well be relieved from the necessity of passing a sentence which there is no intention to execute. A sentence of death is too solemn a matter to be made the subject of a legal fiction."

A case tried recently at Chester assizes before Mr. Justice Stephen deserves notice, as an instance of reconsideration of a case by a jury after a verdict of guilty had been returned. The facts, as stated by the *London Telegraph*, are that a coal agent named McLean had been put upon trial charged with embezzling sums of money belonging to the Lancashire Coal Company. The prisoner's counsel, in a forcible speech, contended that the accounts had only been muddled. The whole deficiencies discovered amounted to £230. The jury found McLean guilty, and the judge commenced to pass sentence, when the prisoner appealed to his lordship to allow him to make a statement. His explanation was that the deficiency was quite accounted for by the fact that three hundred customers had left Birkenhead owing to bad trade, who had not paid him. Several instances were recalled, and the judge said, whether the proceeding was regular or not, he would undertake the responsibility of asking the jury whether, after the prisoner's statement, they wished to hear him (the judge) with reference thereto, and to reconsider their verdict. The jury having decided in the affirmative, his lordship again addressed them, and the jury reconsidered their verdict with the result that they found the accused not guilty, and he was discharged.

The editor of the *Manitoba Law Journal*, whose name appeared in a recent list of Queen's Counsel, does not seem to set too high a value upon the dignity, for he immediately published an article advocating the abolition of the title. The *Law Journal* (London) also thinks the present system of conferring the honour might be improved. "It is an example of the want of independence of the bar," observes our English contemporary, "that the question of precedence should have been left to the Crown to decide instead of being retained under the control of the bar itself. The Lord Chancellor would probably be glad to be relieved of a troublesome and disagreeable duty, and if the bar were to lay down for itself the circumstances in which any of its members may anticipate his seniority, there is no doubt the courts would fully recognize the arrangement. No

regret would be felt at the abolition of the anomalous dignity of Queen's Counsel, which is a comparatively modern institution, originating not in any consideration of merit or convenience, but purely in court favor; and the opportunity might be taken of reviving, in a new form, the ancient order of serjeants, if the Crown should be graciously pleased to place that title at the disposal of the bar."

SUPERIOR COURT—MONTREAL.*

Inscription en droit—Exception à la forme—Articulation de faits.

Jugé:—10. Que lorsque le défendeur a plaidé une exception à la forme, puis une défense en droit, le demandeur ne peut inscrire en droit avant que l'exception à la forme ait été jugée.

20. Que l'on ne peut sur une exception à la forme produire des articulations de faits.—*Lachambre v. Normandin.*

Enregistrement—Renouvellement—Hypothèque—Collocation—Rang.

Jugé:—10. Que le renouvellement de l'enregistrement d'un titre, dans les délais prescrits, là où le cadastre devient en force, n'est nécessaire que pour les droits réels consentis sur un immeuble, c'est-à-dire, les hypothèques ou autres charges constituant le *jus ad rem*; et qu'il n'est pas nécessaire pour les droits dans la propriété, *jus in re*.

20. Que lorsque ce renouvellement est nécessaire, s'il est fait, il valide tous les titres qui découlent du titre enregistré, même ceux antérieurs au renouvellement, lesquels conservent leur rang.—*Surprenant v. Surprenant*, et *La Cie. de Prêt et Crédit Foncier*.

Election municipale—Cité de Montréal—Contestation—Délai pour contester—Obligation conditionnelle—Avantages matrimoniaux—Gains de survie—Evaluation municipale—Mise en demeure.

Jugé:—10. Que les échevins, pour la cité de Montréal, ne sont, d'après la charte de cette dernière, réellement élus que lorsque sur le rapport du bureau des réviseurs, le con-

* To appear in full in M. L. R., I S. C.

seil de la cité a déclaré qui a obtenu le plus grand nombre de votes, et que, par conséquent, le délai de trente jours pour contester l'élection ne commence à courir que de ce jour.

20. Que tant que l'avènement qui constitue une condition suspensive n'est pas accompli ou défailli, le sort de l'obligation conventionnelle qui s'y trouve subordonné, n'est pas lui-même fixé définitivement; qu'ainsi, une obligation consentie par contrat de mariage en faveur de la femme comme gain de survie, est une obligation dépendant d'une condition suspensive, et que durant la vie du mari cette obligation ne peut être considérée comme juste dette de ce dernier, quand même cette obligation serait garantie par hypothèque.

30. Qu'un extrait dûment certifié d'un rôle d'évaluation d'une corporation municipale, fait preuve de son contenu, mais n'exclut pas une preuve contraire d'une valeur plus élevée.

40. Qu'un échevin de la cité de Montréal ne peut invoquer dans une demande contre lui pour manque de qualification foncière, le défaut de mise en demeure suivant la sect. 19 du ch. 51 du statut de 1874, Québec, qu'en autant qu'il peut justifier d'une nouvelle qualification au temps de la poursuite.—*Moisan v. Prévost*.

Autorisation maritale—Exception à la forme—Capacité de la femme mariée—Mari aliéné—Autorisation du juge.

Jugé :—10. Que le défaut d'autorisation de la femme mariée pour ester en justice doit être plaidé par exception à la forme, et que cette informalité est couverte par la comparution du défendeur et son défaut de l'invoquer dans le délai de la loi.

20. Qu'il faut procéder par exception à la forme, même dans le cas où la demanderesse allègue qu'elle est autorisée, et où le défendeur nie le fait de cette autorisation. Un plaidoyer au fond contenant ces moyens sera rejeté sur motion.

—Examen de la doctrine sur l'autorisation nécessaire à la femme pour ester en justice, et sur l'effet du défaut d'autorisation.—*Thomas v. Charbonneau*.

*SUPERIOR COURT, QUEBEC.**

Régistrateur—Tarif.—Jugé :—Sur taxation de compte de régistrateur pour certificat fourni au shérif :

10. Que lorsqu'une propriété immobilière affectée par des hypothèques, a été subseqüemment divisée en plusieurs lots et cadastrée sous autant de numéros, et qu'il a suffi, dans le certificat, de mentionner les hypothèques en rapport avec un des numéros et de ne faire, pour les autres numéros, qu'un renvoi à cette mention, le régistrateur n'a droit, sous le tarif, de charger l'honoraire de 60 cents que pour le premier numéro et, pour les autres, il ne peut demander qu'un honoraire de 20 cents chaque.

20. Que dans le cas de l'hypothèque qui résulte du jugement et de l'avis qui l'accompagne, la mention du jugement et de l'avis ne forme qu'une seule mention et ne donne pas au régistrateur le droit de charger deux honoraires.

30. Que le régistrateur après avoir chargé 10 cents par année de recherches, en vertu de l'item 18 du tarif, n'a pas le droit, sous l'item 15, de charger 20 cents pour chaque acte compris dans ces recherches. (C. S., McCord, J.)—*La Banque Nationale v. Noel*.

Saisie—Gardien—Opposition.—Jugé :—Que le gardien à une première saisie de meubles ne peut pas demander la mise à néant d'une seconde saisie des mêmes meubles où un autre gardien a été appointé : il ne peut que demander sa décharge ou sa substitution au second gardien. (En Révision, Casault, McCord, Caron, JJ.)—*Lefebvre et al. v. Bacon et vir, et Howard, oppt.*

Corporation de Québec—Entretien des rues—Dommages.—Jugé :—Que l'acte 29 Vict. ch. 57, s. 33, No. 8, en mettant, du 1er novembre au 1er de mai, l'entretien des rues dans la cité de Québec, à la charge des propriétaires riverains, ne permet que contre ceux-ci le recours des personnes auxquelles leur mauvais état a causé des dommages. (C. S., Casault, J.)—*Gallagher v. La Corporation de Québec*.

Paiement—Répétition.—Jugé :—Que le paiement du montant demandé par une action et le jugement subéquent prononcé pour les frais ne font pas obstacle à une demande en répétition du surplus antérieurement payé, et qui avait dès lors éteint la dette. (C. S., Casault, J.)—*Mulholland v. Morrison.*

Capitaine—Consignataire—Surestaries—Privilege.—Jugé :—1o. Que le capitaine a l'action pour le recouvrement des frais de surestaries dans le déchargement, contre le consignataire qui n'est pas l'agent reconnu de l'affrètement, et qui reçoit les marchandises sous un connaissement, qui, sans plus spéciales indications, porte l'obligation de les livrer au consignataire sur paiement du fret et de toutes les autres conditions de la charte-partie, lorsque, parmi ces conditions, sont la fixation de jours de planche pour le déchargement, et le prix pour chaque jour additionnel.

2o. Que le capitaine perd son privilège sur les marchandises pour le paiement des frais de surestaries, en permettant à l'allège, qui les a reçues, de laisser les côtés de son vaisseau et d'aller compléter son chargement ailleurs. (C. S., Casault, J.)—*Knudsen v. Lightbound et al.*

Procédure—Saisie arrêt simple.—Le demandeur, durant l'instance, ayant fait émaner une saisie-arrêt simple contre le défendeur, et produit à l'appui de cette saisie-arrêt la déclaration usuelle, récitant les faits déjà relatés dans son action et réitérant les conclusions d'icelle, le défendeur produisit une exception alléguant litispendance.

Jugé : (Sur motion du demandeur pour renvoi de cette exception) que cette saisie-arrêt ne pouvait être contestée que d'après le mode ordinaire, et que l'émanation de la saisie-arrêt simple n'étant qu'une procédure dans la cause originaire, l'exception devait être renvoyée. (C. S., Caron, J.)—*Lavigne v. Hébert.*

Carrier—Damages.—Held :—1. That where the circumstances justify the presumption that a carrier undertaking to convey goods was aware that they were intended for immediate sale, he may be held liable for the loss of profits on such sale, caused by his failure to deliver them.

2. That damages for loss of custom arising from such non delivery are too remote to be held to have been in the contemplation of the parties, and cannot be recovered. (S. C., McCord, J.)—*Behan v. Grand Trunk Railway Co.*

Femme mariée—Responsabilité.—Jugé :—Que la femme propriétaire d'un terrain sur lequel une maison a été bâtie, par suite d'un contrat fait par son mari, en son propre nom, avec les constructeurs de la maison, est responsable du prix de cette maison, parce qu'elle a consenti à sa construction, et que son mari agissait vraiment comme son mandataire—sans le déclarer;—que dans le cas même où son mari ne pourrait être considéré comme son mandataire, elle serait encore tenue, mais seulement jusqu'à concurrence de la plus-value donnée à sa propriété par la dite construction. (En révision, Stuart, Casault, Routhier, JJ.)—*Bélanger v. Paquet et vir.*

Dommages—Lien de droit.—Le défendeur, en sa qualité de syndic à la faillite d'un nommé Douville, annonça en vente, par la voie des journaux, le fonds de magasin, les livres de crédits, etc., du failli. Le demandeur, se fiant sur l'annonce, se rendit à St-Alban, pour mettre une enchère sur la vente des crédits. Les crédits, ayant en grande partie été collectés avant le jour de la vente, ne furent pas mis aux enchères. Là-dessus, le demandeur poursuivit le défendeur pour recouvrer de lui le montant des dépenses qu'il avait faites pour se rendre à St-Alban. Jugé :—Qu'il n'y avait pas de lien de droit entre les parties. (C. C., Caron, J.)—*Dussault v. Bedard.*

Corporation—Damages.—Held, That a municipal corporation using the ruins of burned houses to repair a road, will be responsible for the loss of a horse, caused by his treading on a nail that was amongst such ruins. (S. C., McCord, J.)—*Bernier v. Corporation de Québec.*

Sale of real rights—Estate situate in foreign country.—The sale of real rights is governed by the laws of the place where the immovable is situate. A private writing conveying rights of usufruct in immovables situate in Quebec, is invalid, though executed in Michigan. Such sale should be passed before a notary, and duly enregistered. (S. C., Stuart, C. J.)—*Bélanger v. Mann, & Simard, intv.*

Removal of Land-marks.—The offence of removing land-marks, mentioned in C.S.C., ch. 77, s. 107, can only be committed in relation to boundaries or land-marks which have been legally placed by a land surveyor with all the formalities required by the statute to mark the boundary between two adjoining lots of land. (Crown side, Q.B., Tessier, J.)—*Regina v. Austin*.

Action possessoire.—Jugé: Que lorsque la possession de deux propriétés voisines n'est pas déterminée et rendue certaine par des marques visibles et fixes, le seul recours de de leurs possesseurs à titre de propriétaire est en bornage, et que l'action en complainte pour empiétements doit être renvoyée. (En révision, Stuart, Cassault, Caron, JJ.)—*Lacroix v. Ross*.

Procedure.—Contestation of Bailiff's return of service.—Held, Where an exception to the form had been filed within the prescribed delay, based, amongst other grounds, upon the falsity of the bailiff's return of service, that the defendant might, after the expiration of the delay, move for leave to contest the truth of the return without an impropriation. (S.C., McCord, J.) *Allan v. Arcand*.

Procedure.—Summons.—Affidavit.—Exhibits.—Enquête.—Facts et articles.—Held, 1. That in the Circuit Court, the writ addressed to the defendant, and not to the sheriff or bailiff, is nevertheless good as being sanctioned by the form given in the Code of Civil Procedure.

2. That the letters "G.C.C.," following the signature of the clerk of the court, are a sufficient indication of the quality of the officer signing the jurat of the affidavit which precedes the institution of a penal action.

3. That, under articles 103 and 141, C.C.P., the plaintiff is bound to file only such exhibits as his action is founded upon and as are necessary to support it, and that the absence of any other exhibit does not prevent him from proceeding with the case and foreclosing his adversary, if the latter fails to plead.

4. That when a plaintiff who has foreclosed the defendant from pleading, gives him notice of enquête for a certain day, and

does not proceed on that day, he cannot proceed on a subsequent day without fresh notice to his adversary.

5. That if a party fails to appear upon a rule for *faits et articles*, the interrogatories cannot be taken *pro confessis*, unless the interrogatories as well as the rule have been served upon him. (In review.)—*Paradis v. Poirier*.

Habeas Corpus.—Emprisonnement illégal.—Jugé: Qu'un président d'une assemblée d'électeurs municipaux n'a pas le droit de condamner à vue à un emprisonnement de dix jours dans la prison commune, une personne qu'il allègue avoir troublé la paix publique pendant telle assemblée; que telle commission à vue, d'une personne, n'est pas autorisée par l'article 301 du Code Municipal, et qu'elle sera cassée et annulée sur requête pour *habeas corpus*. (C. S., McCord, J.)—*Ex parte Trepanier*.

Billet promissaire.—Privilege du bailleur de fonds.—Jugé: 1. Que le paiement du prix de vente d'un immeuble par un billet promissaire auquel l'acquéreur n'est pas partie, avec réserve, par le vendeur, de son privilège de bailleur de fonds pour le cas où le billet ne sera pas payé à son échéance, ne fait pas du privilège un accessoire du billet, et que la cession de celui-ci ne transfère pas le privilège.

2. Que le privilège de bailleur de fonds ne peut pas être transporté divisément du prix de vente comme sûreté du paiement d'un billet promissaire auquel l'acquéreur n'est pas partie.

3. Que le transport d'une hypothèque ou d'un privilège de bailleur de fonds, pour saisir le cessionnaire, doit être enregistré et copie du transport laissée à celui-ci. (En révision, Cassault, Caron, Andrews, JJ.)—*La Banque de Québec v. Bergeron*.

APPEAL REGISTER.—MONTREAL.

June 10.

Davidson & O'Halloran.—Judgment confirmed.

Bougie & Symons.—Judgment confirmed; Monk and Tessier, JJ., dissenting.

Molleur & Pinsonnault.—Judgment reformed; Tessier, J., dissenting.

Pinsonnault & Molleur.—Appeal dismissed; Tessier, J., dissenting.

The Court adjourned to September 15.

COUR DE CIRCUIT.

MONTREAL, 6 mai 1884.

Coram JOHNSON, J.

EAGER v. LAJEUNESSE.

*Maison de jeu—Prêt d'argent destiné au jeu—
Droit d'action.*

JUGÉ : *Qu'une personne tenant une maison de jeu et qui ayant quelque intérêt au jeu, prête à une de ses pratiques jouant aux cartes pour de l'argent, dans son établissement et sous ses yeux, une somme qu'elle soit être destinée au jeu, n'a pas d'action en justice pour le recouvrement de cette somme.*

Le demandeur réclamait par son action, le remboursement de la somme de \$55 par lui prêtée au défendeur.

A l'encontre de cette action, le défendeur a produit la défense suivante :

Qu'il ne doit rien au demandeur.

Que celui-ci tient une maison de jeu dans la cité de Montréal où il permet et tolère qu'on joue aux cartes pour de l'argent.

Que le défendeur jouant un jour aux cartes pour de l'argent chez le demandeur et ayant perdu au jeu une somme considérable, emprunta au demandeur la somme de \$55 pour continuer à jouer.

Que le demandeur savait que le défendeur jouait aux cartes chez lui lors dudit prêt ; qu'il savait aussi que ladite somme était destinée à permettre au défendeur de continuer à jouer, malgré les pertes qu'il avait déjà faites. Et pour ces raisons, le défendeur concluait au renvoi de l'action.

Il fut prouvé à l'enquête que le demandeur devait être indemnisé par les joueurs, pour leur permettre de jouer aux cartes dans sa maison et qu'il avait même un intérêt pécuniaire dans la partie que jouait alors le défendeur.

Et la cour, s'appuyant sur l'art. 1927 du C. C. renvoya l'action du demandeur avec dépens.

Action renvoyée.

Curran & Grenier, procs. du demandeur.

Robidoux & Fortin, procs. du défendeur.
(J.G.D.)

SUPREME COURT OF CANADA.

*Malicious prosecution of civil suit—Damages—
Prescription.*

On the 7th July, 1868, the Council of the City of Montreal passed a resolution authorising and directing proceedings to be instituted for the purpose of staying all proceedings of the commissioners appointed under 27 and 28 Vict., ch. 66, and of having the Commissioners (of whom the respondent was one) removed as having forfeited their obligations as such Commissioners. A petition was then presented to one of the Judges of the Superior Court of the Province of Quebec by the Corporation of the City of Montreal, setting forth certain charges of venality and corruption against the respondent, and praying for the removal of the respondent from office. By a judgment of the Superior Court, rendered 17th September, 1870, the respondent was exonerated from the charges of improper conduct, but he was removed from office for another cause which on appeal was declared by the Court of Queen's Bench, and subsequently by the Privy Council, to have been insufficient and unfounded. The respondent in May, 1871, instituted an action against the Corporation, setting forth the above facts, and alleging that the proceedings in the courts had been instituted maliciously and without probable cause, and that the effect of the proceedings had been to injure him seriously in his profession. The City of Montreal pleaded, among other defences, that the action was for libel, and was barred by articles 2262 and 2267 C. C.

Held (affirming the judgment of the Court of Queen's Bench, Montreal, 7 Leg. News, 155, Fournier, J., dissenting), that the action of damages was well founded, and that as the proceedings complained of were only terminated upon the delivery of the judgment of the Superior Court, whereby the plaintiff was exonerated from the calumnious charges, prescription did not begin to run before the date of said judgment, and the action was not barred by articles 2262 and 2267 C. C.—*City of Montreal* (def.) appellant, and *Hall* (plff.) respondent.

COUR DE CASSATION, FRANCE.

PARIS, avril 1885.

MOUNEAU V. DEMOURY.

Responsabilité — Etablissements insalubres — Nuisance — Dommages.

JUGE:—*Que le propriétaire d'un établissement insalubre et nuisible est responsable des dommages qu'ils causent aux propriétés voisines, alors même qu'il est régulièrement autorisé de maintenir cet établissement.*

La cour d'appel avait condamné Demoury à raison du préjudice causé à la propriété du sieur Mouneau, par une briquerie voisine, non seulement à des dommages-intérêts, mais encore, pour faire cesser le préjudice constaté, avait prescrit d'autres travaux que ceux déterminés par l'arrêté d'autorisation du Conseil de préfecture de Seine-et-Oise.

Le sieur Demoury se pourvut en cassation. Par application de l'article 1382 du Code Civil, la Cour de cassation, chambre des requêtes, a rejeté le pourvoi du sieur Demoury contre un arrêt de la cour de Paris rendu au profit de Mouneau.

Il est de principe que les établissements insalubres et incommodes, alors même qu'ils sont régulièrement autorisés, n'en sont pas moins responsables des dommages qu'ils causent aux propriétés voisines. Il s'en suit que les tribunaux judiciaires sont compétents soit pour fixer les indemnités dues aux tiers lésés, soit pour prescrire les mesures propres à faire cesser le préjudice, pourvu qu'elles ne soient pas en opposition avec celles prescrites par l'autorité administrative dans un intérêt général. (*Rapport de Mre Louis Albert.— Journal de Paris.*)

LAWYERS' LIBRARIES.

Charles O'Connor's library was lately sold at auction by the Messrs. Leavitt, of New York. They issued a sumptuous catalogue of one hundred pages. It affords a curious study, and we suppose that it illustrates the growth and decline of the law library of every practicing lawyer who attempts to accumulate a large number of books. There is a period of prosperity in the history of every such practitioner, when money comes in rapidly; when he feels every day an eager love for his profession and a desire to know more and more of its literature. During this period, book-buying goes on in a lavish manner. Then

comes a period of satiety, he begins to tire of the mere accumulation of books. In fact he tires of reading books. He has learned by thorough experience, that new books do not necessarily embody new ideas, and that while some new things come along with new books, such books are, for the most part, mere compilations, mere repetitions of old things, the mere ringing of new changes upon old and worn out ideas. He even finds that this is true to some extent with judicial reports. His experienced eye will run over the head notes of a whole volume of reports without detecting one thing that is really new. And then the reflection really takes hold of him, "What is the good of this unending repetition? In what manner is learning increased by this piling of instance upon instance and dictum upon dictum?" Once in a while a grain of gold is discovered in this mass of drifting sand—a kernel of wheat in the bin of chaff. And he clings to the idea that he will keep up his sets of reports, because these furnish the original evidences of the law; and besides, the money will not be thrown away, because reports in full sets are always valuable property. And so he goes on for a while keeping up his sets of reports, even after their contents have ceased to have much interest for him. Finally he retires from practice. His professional income has ceased, and he finds himself obliged to live upon his investments. At this stage of his career he seriously inquires whether he can afford the strain necessary to keep up his sets of reports, and he is apt to conclude that he cannot. The *dénouement* often is, that, after he finds himself pressed for the means of living, his whole accumulation of books goes to sale during his lifetime. Although they have become useless to him, he clings to them with an affectionate tenacity; and so they go by piece-meal into the hands of the second-hand dealer to meet particular financial exigencies. If, however, he retires on a good income, as Mr. O'Connor did, he clings to them to the last, and they go to sale in the hands of his executor.

These reflections are singularly verified by this catalogue of Mr. O'Connor's library. It contains very few recent works or recent editions. The Alabama Reports, for instance, end with volume 13. Of the American Reports

there are but 33 volumes. The Arkansas and the California Reports, each end with volume 19; the Connecticut Reports end with volume 32: and so on through the State reports. The same is true of text books. Indeed, Mr. O'Connor seems to have desisted from the general policy of book-buying about the year 1866. It is worthy of mention, however, that his appetite for law journals and law reviews lived to the last. He was a subscriber to the *Albany Law Journal*, published in his own State, until his death. He took the *Southern Law Review* during the entire existence of that periodical. He held on to the *American Law Review* until the year 1880, and bound his volumes of it in half calf. The writer of this article, while editing the *Southern Law Review*, had one or two courteous letters from Mr. O'Connor. Something had been said in favor of a stand which he had taken on some important public question, and he wrote to express gratitude for what the editor had said, and said he valued highly the good opinions of his professional brethren. On another occasion we wrote to ask him to send us an article on an important question, partly legal and partly political. His reply was, in substance, that he was past the period of active work, and he told us facetiously, that we might put him in the necrology. He had just passed through a period of illness so severe that nearly every editor in the country had taken down his encyclopedia and written up his biography *de bene esse*. But he lived ten years after that, an honour to his country and to his time.—*The Central Law Journal*.

PHEASANTS AS A NUISANCE.

The decision in *Farrer v. Nelson*, noted in this week's Notes of Cases, will serve as an historical record of the ideas of sport obtaining in the nineteenth century. Four hundred and fifty pheasants had been 'turned down' in a coppice, by the owner of the shooting, for the purpose of being butchered by himself and his friends. The crops of the farmer of the adjoining land were considerably injured, and he brought an action in the County Court for the damage done. The County Court judge held that he was entitled to recover, and the Divisional Court have upheld the decision. It is curious that no reported instance of a similar claim is to be found in the books. In Coke's reports it is laid down as decided that if a man makes coney-burrows on his land, to the increase of coney in so great number that they destroy his neighbour's crops next adjoining, his neighbour cannot have an action on the case against him who made the coney-burrows,

because, the report goes on to say, so soon as the coney comes on his neighbour's land he may kill them, for they are *feræ naturæ*. The possibility of animals *feræ naturæ* being caught and brought on land was undoubtedly not present to the mind of a man of Lord Coke's day. The natural increase of rabbits or pheasants may be kept down by ordinary means, but the 'turning down' of pheasants for the amusement of the sportsman of our day may amount to a legal nuisance. Locusts are *feræ naturæ*, but if a man had a fancy for letting them loose in his garden he could not complain if his neighbour made him pay for what they ate on his side of the fence. The question of legal liability appears to be a matter of degree.—*Law Journal* (London).

NEW PUBLICATIONS.

IN MEMORIAM.—George Etienne Cartier. By G. W. Wicksteed, Esq.

This is a reproduction in book-form of an article contributed by Mr. Wicksteed to a daily journal, on the occasion of the unveiling of the statue of the late Sir Geo. E. Cartier. It also contains some verses by a French writer on the same subject, with a metrical translation by Mr. Wicksteed. The little work concludes with the National Anthem composed by the same gentleman, a production which received the commendation of Lord Dufferin.

FALLACY OF THE INSOLVENCY LAWS, AND THEIR BANEFUL EFFECTS. By Thomas Ritchie.

The author of this pamphlet is President of the Belleville Board of Trade. It is a series of letters which are said to have been offered for publication to leading journals, but which were refused insertion. The writer takes strong grounds against insolvency legislation. He says, "Have stringent laws for the punishment of the fraudulent person and the wrong doer, but banish forever all laws which give occasion to, or encourage fraud and oppression."

THE ELECTOR'S POLITICAL CATECHISM.—Compiled and adapted by Richard J. Wicksteed.

In a pamphlet of 24 pages Mr. Wicksteed seeks to give useful information to electors, the object being to fit them for a more intelligent exercise of the franchise. The form of a catechism is adopted, the authorities upon which the answers are based being referred to at the end of the work. We can hardly assume that candidates will be content to leave the instruction of the elector's mind to Mr. Wicksteed, but we trust that this useful effort will not be without its salutary influence.

The Legal News.

VOL. VIII. JUNE 20, 1885. No. 25.

The expediency of establishing a court of criminal appeal was considered in the English House of Commons during the present session. Sir Wm. Harcourt, while admitting to some extent the justice of the principle, did not think the present system could be charged with serious injustice. The Home Secretary in the course of his remarks made the following important reference to the diminution of crime: "I am happy to think that in this country crime of a serious character is rapidly decreasing. That is one of the most satisfactory features of the time. The sentences of penal servitude are less than one-half what they used to be some years ago. There is, I think, a disposition on the part of those who administer the criminal law to mitigate its severity. I believe that the time has arrived when it may be more considerably done—when the sentences may be less severe and less protracted with equal security to life and property in this country. I have never failed to express that opinion, and upon proper occasions I always like to act upon it. My honored and learned friend has referred to many cases in which men were condemned to death, and the sentences afterwards commuted, and has rather illogically concluded either that the men deserved to die or that they ought to be released as innocent. That is not so. A doubt may have arisen, and in no case of doubt will a Secretary of State allow the sentence of death to be executed."

That some confusion of ideas prevails even in England, with regard to the sanctions of evidence, would appear from the following incident which recently occurred in the City of London Court before Mr. Commissioner Kerr:

"In the course of an action brought by Mrs. Marchant against Mr. C. B. Snelling, a gentleman named Edward Snelling said he wished to make a statement.—Defendant: I object. Are you a Freethinker?—His Honour: I don't know what a Freethinker is. I

will ask the witness if he believes in the existence of a God, and in a future state of rewards and punishments?—Witness: I am an Agnostic.—His Honour: I don't know what that is. I have nothing to do with these grand, learned modern words, which are too often in the mouths of the ignorant. Do you believe in a Deity, and a future state?—Witness: No.—His Honour: Then I can't take your evidence.—Witness: Will you allow me to affirm?—His Honour: No; because a person who affirms must state that he has a conscientious objection to take an oath. That is the law of England, whether right or wrong."

But the *Law Journal* thereon remarks:—"Mr. Commissioner Kerr's reading of the statute-book seems to have ceased before the year 1869. He is stated to have rejected a witness because he could not swear, not believing in a Deity, and because he could not affirm, not having a conscientious objection to take the oath, and he applied these two tests as exhausting the law of England 'whether right or wrong.' But this is not the law of England, as everyone knows whose legal education has not stagnated at a somewhat distant period. Has Mr. Commissioner Kerr never heard of the Evidence Amendment Act, 1869, which allows a man to make a solemn promise and declaration if the judge is satisfied that the taking of an oath would have no binding effect on his conscience? We prefer to believe that the report stops abruptly, and that the witness was eventually allowed to make the declaration."

THE LAUDERDALE PEERAGE.

The question on which the title to the Lauderdale peerage and its yearly income of \$80,000 a year depend is whether Sir Richard Maitland was legally married according to the laws in force in New York prior to the Revolution. From 1765 to 1772 he was an army officer in the colony. It has always been taken for granted that while here he was married to Mary McAdam, and the title to the peerage has descended on this assumption. An unexpected claimant now appears in the person of Sir James Ramsay Maitland, who contests the claim of Major Frederic Henry Maitland, a lineal descendant of Sir Richard, on the ground that Mary McAdam was not the lawful wife of Sir Richard, and hence that the latter left no legitimate offspring.

The facts relating to the marriage in question are involved in no little obscurity. It appears that Sir Richard lived with Mary McAdam, and that she bore him three children. He recognized her as his wife, and by a will written in 1772 made her and the children his heirs. There appears to have been no formal marriage until shortly before his death, in 1772, when it is claimed the ceremony was performed by the rector of Trinity Church. But as the records of the church were destroyed by fire, there is no documentary evidence of the marriage.

Assuming that he took her as his wife by verbal agreement, that they lived together and recognized one another as husband and wife, the question is whether this, without any formal ceremony in the presence of minister or magistrate, constitutes a valid marriage by the laws of New York in force at that time. That it would constitute a legal marriage by the law as construed at the present time is clear. It is now settled in this State that a man and a woman may contract a valid marriage without any ceremony and without the presence of minister, magistrate or witness, "merely by words of present contract between themselves," and by living together in the married relation. The law on this point was thus laid down by the Court of Appeals in a recent opinion:—

"By the law of this State a man and a woman who are competent to marry each other, without going before a minister or magistrate, without the presence of any person as a witness, with no previous public notice given, with no form or ceremony, civil or religious, and with no record or written evidence of the act kept, and merely by words of present contract between them, may take upon themselves the relations of husband and wife, and be bound to themselves, to the State and society as such; and if after that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was in the beginning an actual and *bona fide* marriage."

This is the interpretation that the highest

court of the State now gives not to the statutory but to the common law. The common law prevailed in New York prior to the Revolution. Whether on this point it was then governed by statute, whether the common law of that time is the same as that of to-day, is the question the House of Lords has to decide in the Lauderdale peerage case. On the unexpected claimant rests the burden of proving the invalidity of a marriage which for more than a century has been regarded as valid."—*New York Herald*.

GARON & LAMONTAGNE.

In the case of *Garon & Lamontagne* decided at Quebec during the May Term of the Court of Queen's Bench, Mr. Justice Ramsay delivered the following opinion, which differed in some respects from that of the majority of the Court. The points of difference are noticed in the opinion itself.

RAMSAY, J. This is a very unfortunate piece of litigation. Respondent obtained a franchise for a toll-bridge in the District of Beauce. Within the limits of this franchise some of his neighbours built a bridge. Respondent sued several persons for the penalty for using this bridge. They hurried off to Quebec, it seems, for we have little information on this point of record, and obtained in Chambers a judge's fiat for writs of prohibition against the magistrates. It does not appear that respondent was notified of this proceeding; but when it came to his knowledge that these writs had issued, he instituted proceedings against a number of other persons who, he contended, had violated his privilege.

Again the defendants betook themselves to a judge in Chambers in Quebec, without any kind of notice to respondent, and on the 17th July obtained the following order:—

"Vu la requête ci-dessus et l'affidavit, il est ordonné et enjoint au dit Joseph Morin, juge de paix, dans et pour le district de Beauce, et à tous autres juges de paix, de suspendre et arrêter toutes procédures en vertu des sommations mentionnées en la dite requête, émanées à la poursuite du dit David Lamontagne, contre les requérants mentionnés en la dite requête, en date du 8 juillet courant et rapportables le 18 juillet

"courant, jusqu'à ce que le mérite des brefs de prohibition et les requêtes les accompagnant sous les Nos. 1223 et 1224 des dossiers de la Cour Supérieure du district de Beauce, ait été finalement décidé, et ce sous toutes peines que de droit pour mépris de cour ;"

Under protection of this *ex parte* proceeding, the defendants presented themselves before the magistrates, and obtained a suspension of the suits in conformity with the order. Appellant then applied to the Court at Beauce for a writ of mandamus in each case, setting up the whole story, and particularly that the magistrates had suspended their proceedings in view of the order of a judge.

On the 10th of December, 1884, the Court at Beauce granted the petitions and ordered the issue of all these writs of *mandamus* enjoining the magistrates to proceed with the suits. We are all of opinion that the judgments, ordering the issue of these writs, should be reversed. The order of the judge in Chambers was not a nullity. I think we should go further and say what we think of the order. Unfortunately the majority of the Court declares that it is not prepared to say more than this, that the order in Chambers was not an absolute nullity. I consider it my duty to be prepared to say what I think of the order, so as to explain why I do not concur entirely in the judgment just rendered. It cannot be said that the order of the judge in Chambers at Quebec is an absolute nullity, because it is signed by a judge of a superior court of law, and one of unlimited jurisdiction, and therefore its legality is taken for granted, until formally set aside. It would be otherwise, with regard to an order of one of the inferior courts of limited jurisdiction. When the latter clearly exceeds its jurisdiction, it is *coram non judge*. The magistrates were therefore right in suspending their proceedings, and they should not have been enjoined. The order of a judge in Chambers, sitting out of the district, to which the case properly belongs, in a contentious proceeding, and without consent of parties, appears to me to be in violation of the whole policy of our judicial organization. It is an act not prohibited in so many words by statute, neither is it sanctioned. A

number of sections, however, impliedly exclude such a jurisdiction. For instance, section 16, c. 7, C.S.L.C., provides for sittings of courts and judges at the *Chef-lieu*. Again, section 15 specially gave power to judges of the Superior Court to hear cases in two or more sections at the same time. Section 19 provides for the judge having charge of a district being ill. His place is supplied; the work is not done in another district. Section 25 supplies a remedy where the judge is absent, and celerity is required to avoid the loss of a right. The case does not go to the next district—the prothonotary is empowered to act. Section 20 establishes one exception to the district being the limit of the jurisdiction, and that is where the sole judge in charge of the district is liable to recusation. Then the contentious proceeding may be begun in a neighbouring district. To these may be added cases of *habeas corpus*.

I am therefore of opinion that, although appellants are entitled to a reversal of the judgment of the 10th December, their appeal should be granted without costs, for it is by their manifestly tricky and illegal proceedings that the whole of this worthless litigation has taken place. In this opinion my brother Baby concurs.

In support of the view adopted by the majority of the Court, it has been said that the appellants petitioned the Court sitting at Beauce to suspend the proceedings on all the writs of *mandamus* save one, and that they would be bound by the decision in that case. It has also been said that the judge at Beauce ought to have accorded this demand, that it was a petition which ought to have been granted according to the rules of procedure in France and in England, and that it has been granted here; that the promise of the petitioners to be bound by the decision in the one case, although not signed by the petitioners but by their attorney, was probably authorised, and at any rate the judge might have suggested that the petitioners should enter into an agreement that they would be bound. It seems to me that these reasons are contradictory. If he should have granted a fiat for one mandamus, he was justified in granting them for all.

I do not feel myself called upon to criticise

the refusal of the judge at Beauce to grant this demand for several peremptory reasons. In the first place the refusal to make a suspensory order as required, is purely the refusal to exercise a highly discretionary power unauthorised by any law, and consequently not appealable by its nature. Secondly, the judgment refusing it has not been appealed from, but on the contrary was acquiesced in. The writ of appeal distinctly says the appeal is from the judgment of the 10th December, and so does the *factum*. So little was the judgment on the petitions (the judgment of the 14th November) considered as being in appeal, that in the record of Garon, sent up as the test case, the petition is not mentioned, and at the argument no one thought of pretending that the appeal was from it. Thirdly, if it had been appealed from, and if it had been appealable, there is no evidence sent up with the record to show that Judge Angers had not exercised a wise discretion in refusing these petitions.

We have heard much of the right of the judge to grant a suspensory order in the suit of A against C, because he has a similar case pending against B. I never heard of a case of the kind till the recent one in Montreal of *The North British and Mercantile & Lambe*, 5 L. N. 323. There is no such procedure mentioned in any of the books under the old law, so far as I know. About the modern law of procedure in France I have no right to speak authoritatively, but I took the trouble to look at the authorities quoted by appellant (Carré and Chauveau and Bioche) and I have not there found any *exception de similarité*. I did find that there was an *exception de connexité*, which is not at all the same thing, and which we have recognised on more than one occasion⁽¹⁾. The practice then is derived from England, but it does not appear, as was said in *The North British, &c., & Lambe*, that such an order would be made in England where there were several plaintiffs and the same defendant, which appears by the report to have been the decision in that case. "Nor will the Courts stay proceedings where the plaintiffs in the several actions are different but the defendants are the same." 2 Lush.

(1) See *Chrétien & Crowley*, 5 Leg. News, 208.

SUPERIOR COURT—MONTREAL*

Stenographer's fees—Responsibility of parties.—*Held* :—That a stenographer, though employed by the attorney *ad litem* of one of the parties to take the evidence of his witnesses, is nevertheless the officer of the court, subject (as regards the performance of his duties and the payment of his fees) to the orders and direction of the prothonotary, and consequently, the party so employing him is relieved of all liability for the stenographer's fees, when he deposits the amount thereof in the hands of the prothonotary.—*Morris v. Currie et al.*

Patron et commis—Bref de prohibition.—*Jugé* :—Que le commis n'est pas un serviteur dans le sens du règlement de la cité de Montréal concernant les maîtres et les apprentis et serviteurs.—*Martin v. De Montigny et al.*

Parties to action—Suit by ship owner—Non joinder of co-proprietors—Amendment.—The plaintiff, part owner of a steamship, brought an action as owner, claiming demurrage, etc., under a charter-party. The defendants denied that they contracted with the plaintiff or that plaintiff was owner. On motion the plaintiff was permitted to amend by making the other part owners co-plaintiffs with him.—*Mackill v. Morgan et al.*

Quebec License Act of 1878, 41 Vic., c. 3—Court of Special Sessions of the Peace.—Held :—1. That the Quebec License Act of 1878 (41 Vict., c. 3) is constitutional.

2. That the Court of Special Sessions of the Peace has jurisdiction over prosecutions instituted by officers of the Revenue.—*Molson & The Court of Special Sessions of the Peace, & Lambe.*

Building Society—Confiscation of shares—Notice—Evidence—Liquidators.—*Held* :—1. Where an action brought by a transferee was dismissed on the ground that the consideration of the transfer was champertous, that the transferor regained his rights and might institute the action in his own name.

* To appear in full in M. L. R., 1 S. C.

2. The entry of the word 'forfeited' by the secretary of a building society, opposite the names of certain members in the books of the society, is not sufficient evidence that such members received due notice that their shares would be forfeited if their arrears were not paid,—more especially where the entry was made long after the date of such alleged notice.

3. Under C. S. L. C. ch. 69, s. 15, confiscation of shares for non-compliance with the rules of the building society, must be declared. Such declaration may be made by resolution of the board of directors.

4. Where such confiscation has not been declared previous to the liquidation of the society, the liquidators have no authority to pronounce the confiscation.—*Higgins v. Power et al.*

Chemin — Rue publique — Obstruction — Jugé : — Qu'un chemin qui a toujours servi à l'usage des propriétaires avoisinants, doit être considéré comme une rue publique; et qu'aucun des voisins n'a le droit de l'obstruer pour la détourner à son propre avantage, sous prétexte que ce chemin est établi sur sa propriété.—*Théoret v. Ouimet.*

Seigneuries dans l'ancienne Paroisse de Montréal — Séminaire de St-Sulpice — Droit et valeur de la commutation — Décret — Opposition afin de conserver — Legs et succession — S. R. B. C., ch. 41. — Jugé : — 1. Que le droit de commutation sur les immeubles qui sont situés dans les seigneuries appartenant au Séminaire de St-Sulpice, dans les limites de l'ancienne paroisse de Montréal, devient payable à la première mutation de propriété à n'importe quel titre.

2. Que lorsque, dans ces seigneuries, la propriété sujette à la commutation est vendue par décret, les seigneurs ont le droit de faire à cette fin une opposition afin de conserver; mais, ils doivent demander d'abord que la valeur de leur droit de commutation soit fixée par arbitrage, le montant du décret ne pouvant servir à fixer la base.

3. Que dans ces mêmes seigneuries, lorsque le droit s'ouvre par legs ou succession, il n'est payable qu'à l'expiration de dix ans à

compter du décès de la personne de laquelle procède l'immeuble, savoir, entre les héritiers et le Séminaire; mais cette loi (S.R.B.C., ch. 41, sec. 67) ne s'applique pas aux tiers.—*DeBellefeuille v. D'Odé Dorsennens, et Les Ecclésiastiques du Séminaire de St-Sulpice de Montréal, oppta.*

Saisie-revendication — Possession des effets saisis — Appel — Exécution provisoire. — Jugé : — Que lorsque, dans une saisie-revendication, le demandeur a obtenu un jugement d'un des juges de la Cour Supérieure lui accordant la possession des effets saisis pendant l'instance, et qu'une autre des parties dans la cause porte ce jugement en appel, le demandeur peut obtenir l'exécution du jugement par provision, nonobstant l'appel.—*Whitehead v. Kieffer et al., et White, intvt.*

Prête-nom — Vente — Tiers. — Jugé : — Que quelque soit l'entente entre le propriétaire de certains meubles et un prête-nom, la vente faite à un tiers de bonne foi par le prête-nom en son nom personnel, est bonne et valable, et le propriétaire ne pourra l'attaquer quand même l'acheteur aurait connu au temps de la vente la qualité du prête-nom, celui-ci étant réputé en pareil cas être le maître absolu de la chose qui fait l'objet de la vente.—*Whitehead v. Kieffer et al., et White, intvt.*

Saisie-revendication — Possession des effets saisis — Enlèvement illégal — Mépris de Cour — Contrainte par corps — Appel — Jurisdiction. — Jugé : 1o. Que lorsque, dans une saisie-revendication, la Cour sur requête aura accordé au demandeur la possession des effets saisis, l'enlèvement de ces effets par le défendeur ou par un intervenant dans la cause forcément et contre la volonté du demandeur, constitue ces derniers en mépris de cour, et ils pourront être contraint par corps d'en remettre la possession au demandeur.

2o. Que la cour n'a aucune juridiction pour accorder la possession des meubles saisis à un intervenant, dans une saisie-revendication, lorsque le jugement final maintenant l'intervention a été porté en appel où la saisie est pendante.—*Whitehead v. Kieffer, et White.*

COUR DE CIRCUIT.

MONTREAL, 9 juin 1885.

Coram LORANGER, J.

DOWNIE v. McLENNAN.

Avis d'inscription.

Cette cause avait été inscrite pour enquête et audition sur le rôle du 12 juin 1885.

Le demandeur donna avis de l'inscription le 9 juin 1885.

Lorsque la cause fut appelée, le défendeur demanda que l'inscription fût rayée, alléguant que l'avis n'avait pas été signifié en temps opportun.

JUGÉ :—Que dans les causes non appelables, l'avis d'inscription pour enquête et audition doit être donnée au moins trois jours d'avance. (Art. 1099, C. P. C.)

Downie & Lanctôt, avocats du demandeur.

R. D. Matheson, avocat du défendeur.

(L. A. L.)

INNKEEPER—GUEST—TAKING ROOM FOR PURPOSES OF PROSTITUTION.

WISCONSIN SUPREME COURT, MARCH 31, 1885.

CURTIS v. MURPHY (22 N. W. Rep. 825.)

C. went to a hotel near his residence about midnight with a disreputable woman, registered as "C. and wife," and was given a room for the night. Before going to the room he delivered to the night clerk \$102 for safe keeping, and received a receipt therefor. During the night the clerk absconded with the money.

HELD, that *C. was not a guest, and was not entitled to recover the money from the proprietor of the hotel.*

Appeal from County Court, Milwaukee county.

COLE, C. J. The defendant in this action was a proprietor of the St. James Hotel in Milwaukee. The plaintiff was a single man, and kept a saloon not many blocks distant from the hotel. The following facts are clearly shown by the plaintiff's own testimony :—About twelve o'clock at night on the 13th of March, 1882, the plaintiff came to the hotel with a disreputable woman whom he met on the street, and whose name he did not know, and registered himself and the woman as "Thomas Curtis and wife," called

for a room, and it was assigned him by a person or clerk who was in charge of the office. The plaintiff testified that before going to his room he said to this clerk that he saw on the top of the register that all moneys and jewels should be given to the proprietor; when the clerk replied that the proprietor was in bed, and that he held the position of night clerk. Thereupon the plaintiff handed the clerk \$102 for safe keeping, and took a receipt, which read, "I. O. U. \$102," signed by the clerk. That night clerk absconded with the money. The plaintiff sues to recover it of the proprietor of the hotel.

The natural, perhaps necessary inference from the plaintiff's own testimony is that he went to the defendant's hotel at midnight with a prostitute, and engaged a room solely for the purpose of having sexual intercourse with the woman. True, he says that he went to the hotel as a guest, and asked the clerk if he "could stay there for bed and breakfast." But he lived near by, gave no reason why he did not go to his usual lodging-place, therefore we feel entirely justified in assuming that he went to the hotel for the unlawful purposes above indicated. This being the case, the question arises whether he was a guest in a legal sense, and entitled to protection as such. The learned counsel for the defendant insists that he cannot and should not be deemed a guest under the circumstances, and entitled to the rights and privileges of one. If the relation of innkeeper and guest did exist between the parties, it is difficult to perceive upon what ground the defendant can escape responsibility for the loss of the money handed to the clerk or person in charge of the office; for the common law, as is well known, on grounds of public policy, for the protection of travellers, imposes an extraordinary liability on an innkeeper for the goods of his guest, though they may have been lost without his fault.

It is not easy, says Mr. Schouler, to lay down, on the whole, who should be deemed a guest in the common-law sense; the facts in each case must guide the decision. Bailm. 256. A guest is a "traveller or wayfarer who puts up at an inn." *Calye's case*, 8 Coke, 32. "A lodger or stranger in an inn." Jac. Law Dict. A traveller who comes to an inn and

is accepted becomes instantly a guest. Story Bailm., § 477. "It is well settled that if a person goes to an inn as a wayfarer and traveller, and the innkeeper receives him into his inn as such, he becomes the innkeeper's guest, and the relation of landlord and guest, with all its rights and liabilities, is instantly established between them." *Jalie v. Cardinal*, 35 Wis. 118.

"The cases show that to entitle one to the privileges and protection of a guest he must have the character of a traveller; one who is a mere temporary lodger, in distinction from one who engages for a fixed period at a certain agreed rate. The main distinction is the fact that one is a wayfarer, or *transiens*; and it matters not how long he remains provided he assumes this character." 7 Am. Dec., note to *Clute v. Wiggins*, 451.

In these definitions the prominent idea is, that a guest must be a traveller, wayfarer or a transient comer to an inn for lodging and entertainment. It is not now deemed essential that a person should have come from a distance to constitute a guest. "Distance is not material. A townsman or a neighbour may be a traveller, and therefore a guest at an inn as well as he who comes from a distance or from a foreign country."—*Walling v. Potter*, 35 Conn. 183.

Justice Wilde says, in *Mason v. Thompson*, 9 Pick. 284, that "it is clearly settled that to constitute a guest in legal contemplation it is not essential that he should be a lodger or have any refreshment at the inn. If he leaves his horse there, the innkeeper is chargeable on account of the benefit he is to receive for the keeping of the horse."

Judge Bronson, in commenting on this case in *Grinnell v. Cook*, 3 Hill, 485-490, says where the owner of a horse sent the animal to an inn to be kept, but never went there himself, and never intended to go there as a guest, it seemed but little short of downright absurdity to say that in legal contemplation he was a guest. On principle it would seem that a person should himself be either actively or constructively at the inn or hotel for entertainment in order to establish the relation of landlord and guest.

In *Atkinson v. Sellers*, 5 C. B. (N. S.) 442 Cockburn, C. J., remarks: "Of course a man

could not be said to be a traveller who goes to a place merely for the purpose of taking refreshments. But if he goes to an inn for refreshments in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment and the innkeeper is justified in supplying it."

If a traveller have no personal entertainment or refreshment at an inn, but simply care and food for his horse, he may be a guest, for he makes the inn his temporary abode—his home for the time being. *Ingalls v. Wood*, 36 Barb. 452; *Coykendall v. Eaton*, 55 id. 188. And while the definition of guest has been somewhat extended from its original meaning, it does not include every one who goes to an inn for convenience to accomplish some purpose. If a man or woman go together or meet by concert at an inn or hotel in the town or city where they reside, and take a room for no other purpose than to have illicit intercourse, can it be that the law protects them as guests? Is the extraordinary rule of liability which was originally adopted from the considerations of public policy to protect travellers and wayfarers, not merely from the negligence but the dishonesty of innkeepers and their servants, to be extended to such persons? If so, then for a like reason it should protect a thief who takes a room at an inn and improves the opportunity thus given to enter the rooms and steal the goods of guests and boarders. We do not think that the relation of innkeeper and guest can or does arise in the cases supposed. One whose *status* is a guest is a traveller or transient comer who puts up an inn for a lawful purpose to receive its customary lodging and entertainment. It is not one who takes a room solely to commit an offence against the laws of the State. So upon the facts detailed by the plaintiff himself we have no hesitation in saying that he was not a guest at the hotel within the legal sense of the term. The relation of landlord and guest was never established between them. We feel the more confidence in the correctness of this conclusion when we consider the duties of an innkeeper. An innkeeper is bound to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation;

and he must guard their goods with proper diligence. *Bac. Abr. tit. "Inn and Inn-keeper," C*; *Story Bailm.*, § 476.

Now if the defendant had been aware of the purpose of the plaintiff in applying for a room, could he not have refused to receive him into his house? Nay, more, if the plaintiff had been received by the clerk, and a room had been assigned him, could not the defendant, on learning the purpose for which the room had been taken, have incontinently turned the plaintiff and the woman with him into the street, or have called the police and had them arrested? It seems to us there can be no doubt of the right of the defendant thus to have treated the plaintiff. But if the plaintiff was a guest, and entitled to the rights and privileges of a person having that *status* at the hotel, he could not have been turned into the street, though his profligate conduct was outraging all decency and ruining the reputation of the hotel.

The questions which have frequently come before the courts for consideration were whether a person, upon the facts of the case, was a traveller or temporary sojourner, so as to be deemed a guest, or whether he was to be regarded as a boarder, or one at the hotel as a special customer. These questions are elaborately examined in some of the cases above cited; also in *McDaniels v. Robinson*, 26 Vt. 316; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557; *Hancock v. Rand*, 94 N.Y. 1; *Smith v. Keyes*, 2 T. & C. 650; *Fitch v. Custer*, 17 Hun. 126; *McDonald v. Edgerton*, 5 Barb. 560; *Shoecraft v. Bailey*, 25 Iowa, 554; *Manning v. Wells*, 9 Humph. 746.

It seems to have been taken for granted in the court below that the plaintiff was a guest at the hotel. But the learned County Court held that section 1725, Rev. Stat., requires the guest to deliver his money to the innkeeper himself, or to a clerk having authority from the innkeeper to receive it. As it did not appear that the clerk in this case had such authority, the defendant was relieved from responsibility for the money lost by the clerk. We should hesitate to affirm the correctness of this view of the law. On the contrary, we think a traveller, when he goes to

a hotel at night, and finds a clerk in charge of the office, assigning rooms, etc., has the right to assume that such clerk represents the proprietor, and has authority to take charge of money which may be handed him by a guest for safe-keeping. But still, in the view which we have taken of the character of the plaintiff, and that he was not a guest at the hotel, this error of the court is immaterial. On the whole record the judgment is right, and must be affirmed.

RECENT U.S. DECISIONS.

Gambling Contracts.—When the parties to an executory contract for the sale of property intend that there shall be no delivery thereof, but that the transaction shall be settled by the payment of the difference between the contract price and the market price of the commodity at a time fixed, the contract is void. But it must be shown by a preponderance of the evidence that both parties to the contract intended that it should be performed by a mere payment of differences, and not by a delivery of the property. A party who is sued on such a contract is incompetent to testify as to his intention in entering into it. A party who takes a note given to reimburse the payee for margins advanced by him, with knowledge of that fact, cannot recover thereon.—*National Bank v. Oskaloosa Packing Co.*, Sup. Ct., Iowa; April 23, 1885.

GENERAL NOTES.

An interesting case concerning an innkeeper's liability for the property of a drunken guest has recently been decided by the Supreme Court of Michigan. The suit was brought by a pedler to recover the value of his valise and goods worth upward of \$300, which were stolen at the defendant's hotel after the pedler had put up there for the night. On the trial it appeared that the plaintiff drank freely at the hotel bar, and became somewhat intoxicated, on the evening the theft was committed. A point was made of this fact by the counsel for the defendant, who insisted that the liability of his client was lessened by reason of the plaintiff's drunkenness. The trial judge, however, took a very different view, and charged the jury, on the contrary, that the defendant's liability, if there were any difference, was greater. "In fact," he said, "when the goods were once placed in his charge, the fact that the owner of the goods got intoxicated there at the bar of the landlord, if anything, should hold the landlord to strict liability on that account." On appeal, the Supreme Court approved this statement of the law, and upheld the verdict for the plaintiff.—*Boston Law Record*.

The Legal News.

VOL. VIII. JUNE 27, 1885.

No. 26.

Under the amendment made last year by the provincial legislature (7 Leg. News, 217), the long vacation begins on the 1st of July instead of on the 10th, and extends to August 31 inclusive. The Courts are not obliged to sit between Aug. 31 and Sept. 10. The labours devolving upon the judges of late, under the pressure of increasing business and insufficient accommodation, have been more arduous and harassing than usual, and the necessity of a vacation is more imperative. We hope that the members of the bench will be able to take advantage of it to the fullest extent.

The important amendments made by the provincial legislature during the recent session with reference to abandonment of property and assignments, have been issued in the form of a neat manual by Mr. A. Periard, Mr. R. D. McGibbon, advocate, having undertaken the editorial supervision. The text of the amended law is given and the editor has added some notes and forms, together with an Index which will be found convenient by those consulting the clauses of the law as it stands at present. It may be remarked that the defect in the law of *capias* exposed in the case of *Molson & Carter* (6 L. N. 189), and again adverted to in *Goldring & La Banque d'Hochelaga* (8 L. N. 97), has at length been remedied, and imprisonment can now be ordered in a case like that of *Molson*.

In the judgment in *re Bell Telephone Patent*, 8 Leg. News, p. 34, reference was made to the case of *Barter v. Smith*, which was the first of its kind in Canada, the Telephone case being the second. As this decision is of special interest to all who may have to do with patent cases, we have obtained a copy of the official report prepared at Ottawa, and begin its publication in the present issue, in order that it may be on record for the use of the members of the profession and others interested.

The number of indictable offences committed in England, in the years 1882 and 1883, was 49,534. The returns show that only 20,450 persons were apprehended, and that 15,258 were committed for trial, of whom 11,443 were convicted. There were also 588,710 persons convicted on summary proceedings before magistrates. The punishment of whipping, it may be observed, is far from becoming obsolete, as it appears to have been inflicted in 3,115 cases.

SUPERIOR COURT.

MONTREAL, April 13, 1885.

Before LORANGER, J.

Low, *ex-qualité*, v. BAIN, and PHILLIPS et al.,
opposants, and plaintiff contesting.

Inscription for enquête.

The plaintiff contestant inscribed as follows:—"On the rôle d'enquête for the adduction of evidence."

Opposants moved to strike the inscription "because no such inscription is legal without the consent of the opposants."

"Because no such consent was ever given by the said opposants."

At the argument, opposants relied on *The Exchange Bank v. Craig*, M.L.R., 1 Q.B. 39.

The judgment was as follows:—"Considérant que la demanderesse *ex-qualité* a inscrit la présente cause sur le rôle d'enquête pour audition de la preuve et que cette inscription est conforme à l'article 234 du code de procédure civile;

"Considérant qu'en vertu de cette inscription l'inscription peut être prise au long ou par notes en la manière indiquée par les articles 236 et 263 du code de procédure civile;

"Considérant que le consentement des parties n'est pas requis que pour le cas où l'enquête doit être prise au long (article 234 du même code);

"Considérant que l'inscription, telle que produite ne demande pas que l'enquête soit prise au long;

"Renvoie la motion des opposants avec dépens."

Robertson, Ritchie, Fleet & Falconer, for opposants.

MacLaren, Leet & Smith, for plaintiff contesting.

PATENT OFFICE.

Before THE DEPUTY OF THE MINISTER OF
AGRICULTURE.

OTTAWA, NOV. 1876.

BENJAMIN BARTER V. GEORGE THOMAS SMITH.

Patent Act of 1872—Forfeiture for non-manufacturing—Importation after twelve months.

This case was one in which a dispute was raised against the existence of three patents granted to the respondent in 1873, for alleged forfeiture on the ground of *non-manufacturing*, within two years of the date of each Patent, and on the ground of *importing* after twelve months, in the terms of section 28 of "The Patent Act of 1872."

SECTION 28.—Every Patent granted under this Act shall be subject and expressed to be subject to the condition that such patent and all the rights and privileges thereby granted shall cease and determine, and the Patent shall be null and void at the end of two years from the date thereof, unless the Patentee or his assignee or assignees, shall, within that period, have commenced, and shall, after such commencement, continuously carry on in Canada the construction or manufacture of the invention or discovery patented, in such manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada; and that such Patent shall be void if, after the expiration of twelve months from the granting thereof, the Patentee, or his assignee or assignees, for the whole or part of his interest in the Patent, imports, or causes to be imported into Canada, the invention for which the Patent is granted; and provided always, that in case disputes should arise as to whether a Patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture or his Deputy, whose decision shall be final.

"2. Whenever a Patentee has been unable to carry on the construction or manufacture of his invention within the two years hereinbefore mentioned, the Commissioner may, at any time more than three months before the expiration of that period, grant to the Patentee a further delay on his adducing proof to the satisfaction of the Commissioner that he was for reasons beyond his control prevented from complying with the above-mentioned condition."— "Patent Act of 1872," as amended in 1875.

The petition addressed to the Honorable the Minister of Agriculture (bearing date the 10th October, 1876,) by the disputant, represented that Patents 2409, for a process of Milling; No. 2257, for a Flour Dressing Machine, and No. 2258, also for a Flour Dressing Machine, granted to George Thomas Smith, in 1873, are null and void, and should

be so declared for non-compliance with the provisions of the 28th section of the Patent Act of 1872, requiring manufacturing within two years and forbidding importation after twelve months.

The petition asked that the Patentee should be required, in case he should state his inventions have been manufactured, to furnish the particulars. The petition furthermore alleged that importations of the said inventions had taken place on the 25th day and on the 29th day of April, 1876.

The parties were notified to appear with their witnesses before the Deputy of the Minister of Agriculture at the office of the Minister of Agriculture, at Ottawa, on the 26th October, 1876; but on a joint request of both parties, the hearing was postponed to the 3rd November.

On the 3rd November, the disputant opened his case by reading and filing his own statutory declaration in support of the allegations of his petition; the analysis of which declaration is given hereinafter. On this evidence, and in regard to further proceedings, the case was preliminarily argued in substance as follows:—

The counsel for the disputant contended: That having made a case, and having established *prima facie* evidence of the delinquency of the Patentee, the respondent should be forced to assume the burden of proof, by reason, first, of the peculiar constitution of the present tribunal, instituted to protect the public against the extension of the patentee's privileges; second, from the absence of power to compel witnesses to appear; and, third, because it would otherwise be forcing the disputant to prove a negative;

That on failure, on the part of the respondent, to adduce evidence of his having manufactured within two years, and on failure of rebutting the *prima facie* proof of having imported his inventions, the case should be decided against him;

That, in connection with the importation, it was clear that the importation of the machinery of Patents No. 2257 and No. 2258, did cover the importation of the process of Patent No. 2409, the former being the necessary means of operating the last mentioned invention;

That the Patents having been made null and void at the expiration of the delays granted by law for manufacturing and importing, they should be declared so in the decision which is to be given.

The respondent contended: That it would be a most extraordinary thing to force the patentee to prove a forfeiture against himself, especially when there is positively no other evidence adduced by the disputant than the re-assertion made by himself, of the allegations of his petition, and when really no case is made;

That the whole meaning of the proceeding is plain before the tribunal, namely: It is an attempt on the part of a rival patentee to fish out a grievance, in order to deprive a competitor of his acquired rights;

That unless the disputant declares himself ready to go on with his evidence, of which not a thread is so far shown, this day's proceedings on his part amount to a non-suit, and the case should be dismissed at once.

It was decided that the burden of proof lies on the disputant, but that a sufficient case had been made out to necessitate a thorough investigation of the matter in dispute.

The proceedings were then adjourned to the 17th November.

It was afterwards, by common consent, further adjourned to the 23rd and then fixed for the 25th of November, at which date the evidence was completed on both sides, the case was argued and the decision reserved.

The evidence in the case is composed: 1st. Of official and other documents; 2nd. Of statutory declarations; and 3rd. Of admissions of parties and facts ascertained by the Deputy Minister.

The following is a list and an analysis of the proof adduced:—

Documentary Evidence.

1. The exemplification of Patent No. 2257, granted to respondent, George Thomas Smith, for a "Flour Dressing Machine," under date the 18th day of April, 1873.

2. The exemplification of Patent No. 2258, granted to respondent for a "Flour Dressing Machine," under date the 18th day of April, 1873.

3. The exemplification of Patent No. 2409, granted to Respondent for a "Process of Milling," under date the 4th day of June, 1873.

These three patents have, on their face, the conditions of forfeiture prescribed by the 28th section of the Patent Act, hereinbefore quoted.

4, 5, 6. Three petitions addressed to the Commissioner of Patents, in the month of August, 1876, in relation to the three above-named Patents, by the Patentee, George Thos. Smith, representing generally that he has been unable to dispose of his inventions for want of demand or acceptance on the part of the public; that he believes he has fulfilled the spirit of the law, but as doubts and disputes have arisen, he prays for a further extension of delay; and for a declaration that the offering of his invention for public use upon payment of a reasonable royalty is sufficient compliance with the statute.

(The office answer to the petition was that from the allegations of the Patentee, it did not appear that the said patents had been voided.)

7. A letter of Messieurs Grahame, Howland and Ryerson, of Toronto, attorneys-at-law of the Patentee Smith, inquiring about the mode of obtaining a conclusive decision in the matter of the said disputes, and suggesting that parties questioning the existence of their client's patents should be cited to appear and prove their case, and in default that the decision be given on the showing of the Patentee.

(The official answer was to the effect that the Patent Office could not undertake to initiate a case of dispute.)

8. A letter of Messieurs Edgar, Fenton and Ritchie, of Toronto, attorneys-at-law of the Disputant, Benjamin Barter, raising the present dispute against the three herein-above mentioned patents of the respondent.

9. A certified copy of an Invoice dated 21st April, 1876, from Charles Rakes, of Lockport, in the United States, to Messieurs Howland and Spink, of Thorold, in the Province of Ontario, as attested by Wm. Leggett, Collector of Customs.

10. A printed circular addressed "to Millers" by Benjamin Barter, the disputant, not dated, but posterior to the 25th July, 1876, offering for sale "The Original Middlings Purifier." This circular contains certificates of millers having made use of Mr. Barter's machines; of these certificates ten indicate that they are from the Province of Ontario, the oldest of which is dated the 1st December, 1875, and four are dated July, 1876; the others are from the United States, the oldest being dated the 2nd December, 1872.

11. An authenticated copy of a bill of complaint filed in Chancery, in Toronto, on the 9th September, 1876, on behalf of George Thomas Smith (the respondent in this case) against James Lawson (a witness in this case), concerning an alleged infringement of his (Smith's) patent for a "Process of Milling."

Declaratory Evidence.

I. A statutory declaration made by the disputant, Benjamin Barter, of the City of Toronto, miller, dated the 30th of October, 1876, stating:—

That he (Barter) during the summer of the year 1876 visited the mill of Messieurs Howland and Spink, at Thorold, and saw machines branded G. T. Smith, patentee, and Rakes, of Lockport, manufacturer. That the said machines were imported machines, and covered the material portions of the inventions claimed by patents No. 2257 and 2258; that these machines were ascertained to have been made in the State of New York, by Rakes, for the Patentee, Smith, who caused the said machines to be imported during the month of April, 1876; that these machines were imported, two on the 25th day of April aforesaid as *Smith's Purifiers Machines*, on which \$100 duties were paid; and two on the 29th, on which the same amount of duties was also paid; that these machines are constructed and adapted for the performance of material and substantial portions of the process patented by patent No. 2409; that diligent inquiries have led him (Barter) to believe that Smith's inventions were not manufactured in Canada until about August, 1876, with the exception of one machine, manufactured during the winter months of the year 1876.

II. The statutory declaration of Thomas Laurie, of the city of Hamilton, millwright, dated 22nd of November, 1876, accompanied with two exhibits marked "a" and "b," the first being copy of specifications of Smith's Patents, and the other a printed circular from Thomas Pringle, of Montreal, dated 21st March, 1873, "advertising "Middling's Purifiers," stating:

That on the 6th November, 1876, he called, in company with disputant, on Charles Rakes, at Lockport, State of New York, for the purpose of making enquiries; that the said Rakes informed them that he had manufactured for the Patentee, Smith, the machines erected in Messieurs Howland and Spink's mill, at Thorold, that he (Rakes) had nothing to do with selling these machines to Howland and Spink; that the said Rakes told further, that Smith was charging for his machines considerably more than the cost of manufacturing; that being asked to make an affidavit of these facts, Rakes refused to do so; that he (Laurie) has visited during the then current month of November, 1876, the mill of Howland and Spink, at Thorold, and as a practical millwright of forty years standing, says that these machines are the machines, and the putting into operation of the process described in Smith's specification; that Smith's machines do not require a large expenditure, but could be readily manufac-

tured at any mill with ordinary tools; that for at least three years past there has been a great demand among millers in Ontario for Middlings Purifiers of the description patented by Smith; that he is aware that many machines as advertised in the annexed circular were sold in Ontario during the years 1873, 1874 and 1875; that he is not aware of any of Smith's machines having been manufactured, sold, or offered for sale in Canada for more than two years after the date of Smith's patents, and that if any active effort had been made to introduce them, he (Laurie) should have become aware of it.

III. The Statutory declaration of James Lawson, of the town of Thorold, Miller, dated 11th November, 1876, stating:—

That he knows the Respondent, Smith, who, in company with one Charles Rakes, of Lockport, N.Y., visited him at his (Lawson's) mill, in May, 1876, to ask him (Lawson) to purchase the same machines as he (Smith) was putting up in Messieurs Howland and Spink's mill; Smith informed Lawson that Rakes was making these machines for him (Smith) at the price of \$350, to which price Smith was adding \$250 additional; that he (Lawson) asked to be furnished with the said machines at a lower price, to which proposal Smith's answer was that this was his lowest price; that before that interview Rakes had told about Smith coming to Thorold, and expressed his hopes that Lawson might purchase the machines from Smith to give Rakes the job of building them; that he (Lawson) is acquainted with Smith's machines, and knows they are not of expensive manufacture, but could be built with ordinary tools and materials at any mill. He (Lawson) having been a miller for about twelve years on his own account, is aware that for at least four years past there has been an active demand among millers in Ontario for these Middlings Purifiers. Mr. Spink had told him (Lawson) that he had been negotiating with Smith for the purchase of his machines, and afterwards that he had purchased them from Smith; that in the early part of last summer he (Lawson) saw Smith, who was regulating the purifiers at Spink's mill, and on having remarked about the workmanship, Smith told that he was not to have any more constructed by Rakes; that Mr. Spink told that he had a written contract with Smith for the Purifiers, but being asked by Barter, on the 14th November, 1876, in his (Lawson's) presence, to give affidavit on the subject, Spink declined to do so.

IV. A second statutory declaration of Benjamin Barter, dated 16th November, 1876, accompanied with an exhibit marked "a," being letters exchanged between the said Barter and the firm of Howland and Spink, stating:—

That he, in company with Thomas Laurie, visited Charles Rakes at his place of business at Lockport, where they were informed by said Rakes that he (Rakes) had manufactured the machines at Messieurs Howland and Spink's mill for G. T. Smith, who made the bargain for them; that the said Rakes informed them that he (Rakes) "never saw the said Messrs. Howland and Spink or any one on their behalf, until he went to Thorold, at the request of and for the said Smith, to make arrangements about putting the said machines into the said mill;" that Rakes told Laurie in Barter's presence that Smith charged considerably more than the cost of manufacturing; that Rakes refused to make affidavit of his said statements; that Smith admitted to him (Barter) that the machines put in Howland and Spink's mill are his (Smith's) Purifiers; that Smith's machines do not require much expenditure, but can be built with ordinary tools and machinery at any mill; that for several years past there has been an active demand among millers in Ontario for machines of that description; that the letter annexed is in the handwriting of Mr. Spink, of the firm of Howland and Spink, and was received by him (Barter); that he (Barter) was informed by Mr. Spink, on the 26th February, 1876, that Smith had been telegraphed to come over to close the bargain for the purchase of the said machines; that later, Mr. Howland told him (Barter) that he was too late, their firm having bought from Smith, who had come to Toronto to sell his machines; that Messieurs Howland and Spink have declined to give evidence in the case.

The letter of the firm of Howland and Spink, dated the 9th February, 1876, annexed to the above declaration and referred to, is to the effect:—That Mr. Spink has just returned from the United States; that he has found Smith's process of milling the best he has ever yet seen; that Smith's Purifiers are sold for less money than Barter's machines; that Smith's machines have such a reputation that American millers will have no other; that they expect Smith to come soon, and in the meantime should like to see Barter, as their machines will have to be ordered from some manufacturer in a few days, and that he (Barter) had better call on them at once.

The answer of Mr. Barter to this letter, is dated 12th February, 1876, and is to the effect:—That he purposes soon going to Thorold; that the (so-called in the States) Smith's plan of milling is good, meaning the mode of milling at present adopted there; but that "as the means by which it is effected belong to myself (Barter) the mode of milling for which the means were invented, must also of necessity belong to me" (Barter); that he is anxious for the patronage of the firm, and should be most sorry if they do not come to terms.

V. A third statutory declaration of Benjamin Barter, dated 20th November, 1876, stating:—

That he (Barter) had been informed, in February 1876, by Mr. Spink, that G. T. Smith had had one of his machines manufactured at Dexter, in the county of Elgin; that he (Barter) went in the month of May 1876, at Dexter and St. Thomas, to enquire about the fact; that he, having enquired from millers around, "could not find any one who knew of any such machine as a "Middlings Purifier having been made or "offered for sale in that neighborhood;" that he verily believes that no such machine as patented under No. 2257 was ever constructed there previous to May, 1876.

VI. An affidavit, in the form and manner in practice in the United States, from the respondent, George Thomas Smith, made and signed in Jackson county, State of Michigan, and dated 23rd November, 1876, stating:

That he (Smith) has never imported into Canada any of the machines manufactured under his Canadian patents; that he has offered to millers in Canada, personally and through agents, to sell the right to use his inventions for a reasonable compensation; that he never refused to furnish his machines manufactured in Canada; that he did not purchase nor import the machines placed in Messrs. Howland & Spink's mill at Thorold; that the sale of said machines and the payment thereof was a transaction between the millers and Rakes, in which he (Smith) had no interest; that he (Smith) sold to Messrs. Howland & Spink the right of using his process under patent No. 2409, and superintended the arrangements of the machinery for carrying on the said process; that his (Smith's) royalty for the use of his process and machine No. 2257 was the only profit and emolument which he received in connection with the said Howland & Spink's mill at Thorold.

VII. The statutory declaration made in Toronto on the 22nd day of November, 1876, by Charles Rakes, machinist, of Lockport, in the State of New York, stating:

That he has constructed at Lockport the machines put up in Messieurs. Howland & Spink's mill at Thorold; that such machines are after American patents, of which G. T. Smith is the patentee, and are nearly equivalent to the Canadian Patent No. 2257, and that the distinguishing feature of No. 2258, viz., the grading reel, does not appear in the machines set at Thorold; that the first opening in connection with this transaction was the meeting of Mr. Spink, in December 1875, at the North Buffalo Mills; that the said Mr. Spink told there, to him (Rakes), that he had been visiting that part of the state of New York to enquire into the relative merits of the various Middling Purifiers, and that he

(Rakes) had been recommended to him (Spink) by M. A. Chester, of the firm of Thornton & Chester, millers, of Buffalo; that previous to that interview with Mr. Spink he had not had any communication with G. T. Smith, nor with any person on his behalf, in regard of putting Purifiers in the said mill of Messrs. Howland & Spink, and that he (Rakes) never said that he had had such previous communication with G. T. Smith,—“the assertion contained in Benjamin Barter's declaration to that effect is false;” that on the occasion of the said first interview, Mr. Spink visited Rake's factory at Lockport; that he (Rakes) visited Thorold on or about the 11th of February, 1876, and met there George T. Smith and Mr. Spink, arranging for the sale of the right to use Smith's inventions.

They all three went to Toronto to meet the other member of the firm, and it was when returning to Thorold that he (Rakes) finally bargained with Mr. Spink to build the said machines for him at the price of \$350 a piece, free on board at Lockport; that he was to be paid by Messrs. Howland & Spink; was paid \$1100 by them, and looks to them for the balance still due; that he (Rakes) has had, for about two years, an agreement with Smith to furnish millers with Smith's inventions in the United States at stated prices, but not for use in Canada; that at the time that he (Rakes) was putting up the machines in Messrs. Howland & Spink's mill at Thorold, the said Smith proposed to him (Rakes) to undertake the manufacture in Thorold of machines to be used in mills in Canada; that it was expressly proposed by the said Smith that if Mr. James Lawson should purchase the right of using his inventions, that he (Rakes) should manufacture the necessary machines at Thorold, in Canada; that the said Lawson did not purchase the said right; that he (Rakes) does not recollect having told Barter, in the terms of Barter's declaration, that the bargain for the machines had been made by Smith; if anything were said on the subject it must have been that Smith had concluded an agreement for the sale of the right to use his inventions; that to the best of his (Rakes) knowledge, Smith has had no interest or commission or profit on the sale of machines manufactured by him (Rakes), in any case; that he had travelled a good deal in Canada during the last four or five years for the purpose of selling mill machinery, and that until within the last year or two he saw very little use of and heard of very little demand for Middlings Purifiers; that the connecting machinery to apply Smith's process at Messrs. Howland & Spink's mill at Thorold were made by the millwrights at the said mill at Thorold, under direction of said Smith; that he (Rakes) declined to give an *ex parte* affidavit, but ex-

pressed his willingness, to Barter, to appear before any judicial authority to be examined on oath; that he (Rakes) has made the present declaration on account of having been informed by Messrs. Grahame, Howland and Ryerson that the conversation he (Rakes) had with Barter was to be made use of to influence the decision of the Commissioner of Patents, and because the statements reported as contained in Barter's declaration “were misrepresentations and tended to give a false impression of the facts of this case.”

FACTS ADMITTED OR ASCERTAINED.

a. The disputant admits that nothing is proved as regards the alleged importation of the invention patented under No. 2258.

b. The disputant admits that he has never made any request to George Thomas Smith for the use of Smith's patented machines and process.

c. It is ascertained by the records of the Patent Office that the disputant, Benjamin Barter, has obtained a patent for a “Flour-dressing Machine” on the 20th day of January, 1874, numbered 3014; another patent for “The Original Middlings Purifier” on the 8th day of April, 1876, numbered 5942, and another patent for “Middlings Purifier” on the 17th day of July, 1876, numbered 6325. These three patents are for the same object as respondent's inventions, and therefore competing with them.

The case was first argued by the counsel of the respondent, reviewing the evidence of the disputant before producing his own evidence (Declarations VI and VII), which he read and filed at the conclusion of his arguments.

Grahame, Howland & Ryerson, counsel for the respondent, argued in substance:—

That to void a patent on account of non-manufacturing it is necessary to prove that the patentee has refused to furnish his invention to some one desirous of obtaining it, and that to void a patent on account of having imported the invention requires the proof that the patentee himself, or his assignees, has imported or caused to be imported the said invention;

That nothing of the kind has been proved. The evidence, such as it is, being only an attempt to establish that Smith did not actually manufacture his machines, and that he was a party to the importation of invention No. 2257, which the plaintiff tries to connect with patent No. 2409, for a process, a position which is utterly untenable;

That it is plain that machines of a large size and costing several hundred dollars, and especially a process which involves the construction of a mill to apply it to, are not things which may be made in advance of demand and kept in stock. For several years the Canadian millers have waited for the result of experiments carried on in the United States with these Middlings Purifiers, and it is only of late that a demand has been created for them in Canada;

That the whole evidence given by Barter and his witnesses is mere hearsay, mere conversations filtered through the medium of interested parties. The subsequent declarations of Barter amount to an admission that he tried to get information on what he had already presumed, in advance of such information, to become a witness;

That Rakes' alleged answers to the enquiring Barter and friends, are susceptible of an interpretation very different from that attributed to them in the declarations filed in this case. Smith admits that he did sell to the millers, on payment of a royalty, the licence to use his invention; but nothing proves that Smith was the channel through which Rakes undertook to manufacture the machines imported at Thorold; the correspondence between Barter and Spink, filed by Barter himself, is a proof to the contrary;

That the whole evidence adduced by Barter is quite consistent with the interpretation that the negotiations which have caused the importation of machine 2257 are totally independent of Smiths' contract with the millers for the privilege of using his process of milling, or even the imported machine; the whole in fact proves very little more than the Customs Records, which show that the goods were sent by Rakes to the miller. To have imported or caused to be imported in the spirit of the statute, the patentee must be either the consignee, the consignor or the owner of the thing imported. Smith is proved to be neither the consignor nor the consignee. Was he the owner? Nothing is proved to show that he was;

That there is not evidently any proof that Smith, the patentee, did refuse manufacturing for or selling to any applicant, and there is no proof that he imported or caused to be im-

ported any of his three inventions; but to add, to the want of proof of the plaintiff, a positive proof that the defendant has done nothing to forfeit his patents, he (the counsel) filed an affidavit of Smith and a statutory declaration of Rakes the manufacturer.

Edgar, Fenton & Ritchie, disputant's counsel, argued in substance:

That, to start with, the application of the defendant for an extension of time is an admission of non-manufacture, besides containing in words the admission that he did not manufacture. The stringency of the law rests on the word *unless* the patentee does a certain thing, which ought to be construed in its strictest sense, because it refers to an exclusive privilege which the Legislature intended to restrict in certain expressed limits; the patent is a restriction in favor of an individual against the public and these conditions are restrictive upon the individual in favor of the public;

That the law is not to be interpreted to mean what it ought to mean or as any one would like it to be, but as it is. The patentee loses his patent *unless he shall have commenced, &c.* (see the 28th section hereinbefore cited). To the plain condition of manufacturing, the law adds another condition, which is that it must be done in a manufactory; if the law had stopped at the word *patented*, it might have been made in a cellar, but the Act requires that it must be done openly. The letter of the law must be taken as it is, because it shows the spirit of the law. Here the Counsel quoted passages from Potter's *Dwaris* on interpretation and construction of the laws);

That this tribunal has no latitude; it is a Court in which the Minister, or his Deputy, is not acting as an executive officer, who, in the ordinary dealings of the Patent Office, can exercise a certain discretion and show a certain leniency; here he is bound to take the words of the law. There are cases in which the strict meaning of the law would create impossibilities, such as, for instance, the case spoken of in a previous conversation, of a graving dock being patented; if the law had not provided for such cases it would become necessary to fight for the spirit of the law as applied to an exceptional case: but the statute has provided for such cases by subsection 2 of the 28th section, which gives to the Commissioner the power of granting an extension of time, which may be for any number of years of the

duration of the patent. The letter of the law is binding for this tribunal as well as for any Court of law;

That the three patents of respondent expired with the two years of delay for want of manufacture. The forfeiture applies to Patent No. 2409 although for a process, as well as to the two others. The law says that this condition is to be inserted in every patent granted; therefore it is necessary that a meaning be found to that condition as relates to a process as well as to anything else. The Patentee did himself admit that he has no more worked the process than the machines, in his petition for the extension of time;

That the voidance on account of importation does apply to the process, inasmuch as the machines are the means to carry the process into operation, as it is admitted by the Patentee in his petition where he asserts that these machines are necessary for that purpose. In fact, in the question of importation as well as of manufacturing, the process cannot be separated from the machines;

That an answer by letter was given the other day by the Patent Office, to a question put at his (Counsel's) advice, that the importation of the various parts of a machine to be put together in Canada is, in the meaning of the law, an importation of the invention;

That it would have been easy to manufacture these inventions in Canada is fully established; that it is also proved that there was an active demand for them, the circular received by Laurie in 1873 shows that they were in demand;

That he (the Counsel) is not prepared to say that Smith imported himself, but it is proved that he caused such importation of Invention No. 2257, and consequently of Invention No. 2409. Smith denies having imported the machines, but he does not deny having caused them to be imported. The Statute does not speak of the interest the Patentee might have in the transaction. Smith got his royalty and superintended the arrangements of these machines. The evidence of Barter, Lawson and Laurie taken together, with the admission of Rakes and Smith, show that the bargain was entered into between Smith, Rakes and the firm Howland and Spink;

That it is proved that Smith has a written contract with Messrs. Howland and Co., but the last mentioned gentlemen have refused to furnish copy of the said contracts and also refused to give evidence on the subject;

The defendant's own case shows that Smith has not manufactured, within two years of the date, any of his three Patents and that he has caused to be imported, after the expiration of twelve months from the said date, the machines of Patent No. 2257, and consequently the process of Patent No. 2409.

The respondent, argued, in reply in substance:—

That the hearsay evidence and disconnected conversations adduced by the plaintiff, are destroyed by Rakes' testimony, which gives as proof the history of the whole transaction; which originated out of Smith's knowledge, during a visit made by the miller in the United States for the purpose of examining Middlings Purifiers there, and of selecting the best he should happen to meet with, irrespective of patents or persons. There is not a shadow of evidence to show that Smith did cause the importation; of course, having decided after that visit to adopt Smith's process and machines, the millers had to settle with Smith for his royalty. The law rules that the Patentee must allow *any person desirous to use, &c., (see section 28 here before cited)*; but the Patentee is not requested to bind the purchaser as to where and from whom the article is to be procured. The Patentee is bound to sell the use of his invention; he is not bound to dictate to the purchasers what tools and what men they (the purchasers) are to employ. It is argued that Smith did not, in his affidavit, say in so many words that he did not cause the importation; such technical omission has no weight in such a declaration; Smith denies, supported by Rakes' evidence, that he (Smith) had anything to do with the importation;

A Patent is not a matter of privilege, it is a contract, and the interpretation ought to go to limit the conditions of forfeiture and not to extend them. As regards a process there are many ways of carrying the same process into operation, and each particular way of doing it is not necessarily connected with and cannot be taken as being identical with it.

The disputant argued, in reply:—

That there could not be any doubt about the failure of the Patentee to manufacture within two years of the date of his Patents; he has not sold or produced any machine or mechanical combination to work his inventions in Canada within the time fixed by law, and he admits this in his petition for an extension of the delay primarily fixed by the statute, beyond which delay, having failed to work his inventions, his patents become null and void; as they are null and void for that cause;

That as regards importation, it is equally clear that Smith has caused this to take place. Howland and Spink clearly could not purchase or import this machine without the assent of Smith, the Patentee; Smith assented to the importation before it took place. If he had not given that assent he would have caused it not to be imported; therefore when he gave his assent he occasioned or caused its importation.

[To be Continued.]

The Legal News.

VOL. VIII. JULY 4, 1885. No. 27.

The decision given by the Supreme Judicial Court of Massachusetts in *Bishop v. Weber* (June, 1885), opens up an extensive field of litigation with possibly beneficial results to the stomachs of the public. The Supreme Court holds that a caterer is liable in an action of tort for negligence in furnishing unwholesome food. The plaintiff's action was demurred to, and the Superior Court sustained the demurrer; but this decision has just been reversed by the Supreme Court on appeal. Chief Justice Allen says: "If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such by those who arrange for an entertainment to furnish food and drink for all who may attend it, and, if he undertakes to perform the services accordingly, he stands in such a relation of duty toward a person who lawfully attends the entertainment and partakes of the food furnished by him as to be liable to an action of tort for negligence in furnishing unwholesome food whereby such person is injured. The liability does not rest so much upon an implied contract as upon a violation or neglect of a duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests." The Chief Justice adds that it is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appear that he ought to have known of it and was negligent in furnishing unwholesome food, by reason of which the plaintiff was injured.

We cited lately the provision of the English Evidence Amendment Act, 1869, with reference to the substitution of a declaration in certain cases. This may be supplemented by an extract, sent to a contemporary, from the Public Statutes of Massachusetts. Sec. 17 of

chap. 169 of the Public Statutes, provides that "every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury; and the evidence of such person's disbelief in the existence of God, may be received to affect his credibility as a witness." Sec. 18 of the same chapter provides that "no person of sufficient understanding * * * shall be excluded from giving evidence as a witness in any proceeding," except husband and wife as to private conversations.

It is not surprising that in a country where more than one-half of the criminals who do not escape altogether are only reached by lynch law, Mrs. Dudley should find sympathy and protection from a jury. This poor woman, who does not seem to have the excuse of insanity, was only doing openly what the members of Vigilance committees usually do secretly under the cover of masks or other disguises, and her act is not a whit more reprehensible.

The Coleridge libel case (7 L. N. 401) has come to an end. The *Law Journal* observes: "The settlement is a subject of sincere congratulation to all except those who consider themselves cheated out of a sensation. The only remark to be made about it is that it would have been better done if it had been done more quickly. The unlucky position in which things were left at *Nisi Prius*, with a jury of one opinion and a judge of the contrary opinion, was perhaps responsible for prolonging the conflict. The case is now interesting purely as raising certain abstract questions of law. The course taken by Mr. Justice Manisty at the trial is justified in point of law. As the Master of the Rolls stated, it is based on a practice 'in use for a couple of centuries before the Judicature Act.' Mr. Justice Manisty would, however, in a case involving character, have done better if he had left either party to move for judgment. The remarks made by the Master of the Rolls during the hearing were sufficient to show that in the opinion of the Court of Appeal there was in the terms of the letter and the subsequent conduct evidence of what in law is called malice."

PATENT OFFICE, CANADA.

Before THE DEPUTY OF THE MINISTER OF
AGRICULTURE.

OTTAWA, February 15, 1877.

BARTER V. SMITH.

Patent Act of 1872—Onus probandi—Importation after twelve months—Non-manufacturing within two years—Interpretation of provisions of Patent Act.

1. *In case of a dispute under the Patent Act of 1872, the onus probandi lies on the disputant who seeks to defeat the patent, and not on the respondent,—the patent held by the latter being a public title which must be taken as good so long as nothing to the contrary is established, even if the evidence involved the the proof of a negative.*
2. *An invention being recognized as property, and the granting of letters patent being a contract between the State and the discoverer, the patentee's rights are not to be interfered with, except for serious reasons deduced from the liberal interpretation of the terms of the contract.*
3. *The words "carry on in Canada the construction or manufacture" mean that any citizen of Canada residing on federal soil has a right to exact from the patentee a licence of using the invention patented, or to obtain the article patented for its use at the expiration of the two years' delay, on condition of applying to the owner for it, and on payment of a fair royalty; and the words "imports or causes to be imported into Canada" imply that injury is done to home labor.*
4. *Where a patentee refused no one the use of his invention, and the importation made with his consent after the expiration of the year was inconsiderable and inflicted no injury on Canadian manufactures, but was made as a means to create a demand for the invention which the patentee intended to manufacture and did in fact offer to manufacture in Canada, it was held that he had not forfeited his patent, though the manufacture or construction of the patented article had not been commenced in Canada within the statutory delay.*

[Continued from page 208.]

J. C. TACHÉ, DEPUTY MINISTER :

The importance of this case, serious in itself, is enhanced by the circumstance that it is the first of its kind in Canada, and that the legal interpretation and the appreciation of facts which it involves apply to very many Patents granted, and, eventually, to all Patents to be in future granted. For these reasons ample time has been devoted to the study of the question, and it has been thought not only desirable, but almost necessary to enter at some length into the explanation of the principles and construction of facts upon which the present decision is based.

It seems proper to take up first the preliminary points raised in the case, which were at once decided, as stated in the report of the proceedings hereinbefore given.

It was asked that it be ruled that the *onus probandi* lies with the respondent, inasmuch as this tribunal, being an exceptional one, not restrained by any form of proceedings or subjected to any special kind of evidence, and having no power to compel witnesses to appear, is bound to exact from the respondent proof that he has complied with the requirements of the law; and furthermore, inasmuch as to rule otherwise would be imposing upon the disputant the duty of proving a negative.

The constitution of this tribunal is not of an unknown character; such jurisdiction is given to the administration in many countries; and in some, in the Austro-Hungarian Empire, for instance, that jurisdiction extends so far as to vest in the Executive officer the exclusive power of deciding all cases concerning invalidity or lapsing of patents. The tribunal is not devoid of all means of getting at the truth, the fact of not being restrained by fixed rules of procedure and stringent modes of evidence, being a compensation for the want of power to compel witnesses. It is self-evident that it was the intention of the law maker to exact only one condition in the judge's mind in delivering his decision, that he be convinced of the substantial justice of such decision on sufficient information, no matter how obtained.

Notwithstanding that this tribunal is not restricted by fixed rules of practice, it is nevertheless bound to abide by the rules of common justice, by the dictation of common reason, and to be enlightened by such decisions as may be held to embody the common consent of mankind.

It is apparent that this case, being one in which the disputant urges the forfeiture of an acquired right which the respondent is presumed not to have lost nor alienated, the burden of proof cannot be admitted to lie on him who holds a public title which must be taken as good so long as nothing to the contrary is established, even if the evidence involved the proof of a negative. In this case the evidence does not rest on establishing a negative but on ascertaining the existence of positive facts.

It would not be right, however, to say—and this ought not to be taken as meaning—that in no case should the respondent be forced to make discovery; there might be cases in which, from the position of the parties and the aspect of affairs, this tribunal might be compelled to make use of all the latitude left to it by the statute, in order to attain the ends of justice. The nature of the 28th Section of the Patent Act, both in providing against certain mischiefs with certain remedy and in establishing a special tribunal to mete out the remedy, involves a policy which goes, on public grounds, beyond the limits of any particular case to be adjudicated upon. This is evidently the reason why the Legislature has selected the Minister of Agriculture to constitute the tribunal to decide such questions in which it will avail of the practical knowledge of and acquaintance with the nature and bearings of such matters acquired in the daily working and dealings of the Patent Office.

It has been hinted in the arguments, that should a decision intervene declaring a patent null and void, it ought to specify that the patent was voided at the date of the expiration of the delay mentioned in the law, and has stood null since to all intents and purposes. As this incidental question touches rights which do not come within this jurisdiction, it appears clear that, in duty and through respect for the higher Courts, this tribunal is

forbidden from entering such domain, even by expressing an opinion, being bound to restrict its investigations and decisions within the narrowest possible limits. The law orders that the Minister of Agriculture should say "*whether a patent has or has not become null and void*," consequently the judgment is simply to decide *it has* or *it has not*, as the case may be: all the consequences that may follow are to be adjudicated upon by the ordinary judges of such disputes between citizens.

There is a view of the subject matter of patents for inventions invoked in this case, which it is of great importance to examine, as bearing in a marked manner on the interpretation and construction to put upon both law and facts connected with the working of patents; the question comes to whether a patent should be held as an embarrassing privilege, a kind of onerous monopoly which constitutes the patentee as a sort of adversary to the liberty of the subject, and as opposed to public interest, by the very fact of his holding a position which then, it is argued, should be jealously watched and which ought to be made to terminate at the first opportunity.

It is universally admitted in practice, and it is certainly undeniable in principle, that the granting of Letters Patent to inventors is not the creation of an unjust or undesirable monopoly, nor the concession of a privilege by mere gratuitous favour; but a contract between the State and the discoverer.

In England, where Letters Patent for inventions are still in a way treated as the granting of a privilege, more in words, however, than in fact, they, from their beginning, have been clearly distinguished from the gratuitous concession of exclusive favours, and therefore, were specially exempted from the operation of the statute of monopolies.

Invention being recognized as property, and a contract having intervened between society and the proprietor for a settlement of rights between them, it follows that unless very serious reasons, deduced from the liberal interpretation of the terms of the contract, have happened, the patentee's rights ought to be held as things which are not to be trifled with, as things sacred, in fact, confided to the guardianship and to the honor of the State and of the Courts.

As it is the duty of society not to destroy, on insufficient grounds, a contract thus entered upon, so it is the interest of the public to encourage and protect inventors in the enjoyment of rights legitimately and sometimes painfully and dearly acquired. The patentee is not to be looked upon as having interests in direct opposition to the public interest, an enemy of all in fact:

"The gain made by the inventor when his invention is known will be," says Agnew, "proportionate to the amount of benefit which the public derive from the use of it."*

"It is almost self-evident," says an able American author, "or at any rate readily susceptible of proof, that the magnificent material prosperity of the United States of America is directly traceable to wise Patent Laws and their kindly construction by the courts."†

"The increasing development," says Armengaux, "which inventive genius undergoes is principally due to the protection, very insufficient as yet, which is granted by most governments to those who are the real promoters of arts and industry."‡

These short quotations, which might be easily multiplied almost *ad infinitum*, are to show what view is taken of the matter by writers who have devoted a great deal of their life to the study and practice of the laws relating to the very important subject of inventions, and in the consideration of the influence on public prosperity of patents granted to inventors as the price paid for their discoveries.

The manner in which this tribunal should construe the law was argued in the sense of a strict literal interpretation of words, and quotations were made in support of this view. The soundness of the doctrine propounded in those quotations is undeniable and undenied.

In order that no doubt should exist on the rules of interpretation adopted in the present decision, it is well to express them in terms of its own. It is held that the words of the

law constitute the body of the law, in which dwells the spirit of the law, and that to separate one from the other would be the death of the law.

The Legislature cannot adequately provide for the administration of the statutes—it cannot see into the details necessary to attain the object in view—it cannot foresee the combination of circumstances appertaining to each case; it does not go into the technicality of specific subjects, and it cannot prophesy what uses might be made of the language of the law; hence the necessity of legislation being followed, step by step, by jurisprudence. The very words which may be invoked, in a certain sense, as applicable to certain points in one case, might serve to defeat the object of the Legislature in another case.

This tribunal, like all others, has to make sure of the intention of the Legislature. A certain public advantage is sought for and a mischief provided against by the Patent Act, as applied to this case; the duty of the tribunal is, therefore, to see whether the advantage has been virtually and effectually denied, and whether the mischief has been actually committed, and to apply the remedy, if need be, to attain the object in view without undue and inadequate detriment to acquired and vested rights.

The dispositions of the 28th section (hereinbefore quoted at length) of "the Patent Act of 1872" were introduced into Canadian legislation *pari passu*, with the extension of the privilege of obtaining patents for inventions, [first] to all residents and [second] to all comers. Such provisions as to manufacture and importation do not exist in the Patent Laws of England or in the present Patent Laws of the United States, but they do exist in the Patent Laws of other nations.

The Patent Act of 1869, removing other disabilities, extended the right of obtaining patents to every resident of one year in Canada, and subjected all patented inventions to the condition of manufacturing within three years and of not importing after eighteen months; the decision of the question, as to whether or not a patent had lapsed for reason of non-compliance, was left to be pleaded and to the ordinary courts to adju-

* Agnew—the Law and Practice relating to Letters Patent for Inventions. London: 1874. Page 4.

† Simonds—Manual of Patent Law. Hartford and New York: 1874. Page 10.

‡ Armengaux—Guide Manuel de l'Inventeur et du Fabricant. Paris: 1858. (Preface.)

dicata. The law of 1872 extended the right of obtaining patents to all comers, and appointed a special tribunal to apply the law in the manner mentioned in the 28th section hereinbefore quoted.

So far, the intention of the Legislature, as shown by the history of the legislation, is evidently to guard against the danger of Canadian patents, granted to aliens, being made instrumental to secure the Canadian market in favour of foreign patents to the detriment of Canadian industry; for, in the measure that the right of taking patents was extended, the remedy against the dreaded danger was made more ample, but at the same time the jurisdiction over such cases of dispute as might arise was transferred from the judicial tribunals to the administrative tribunals, evidently for the purpose of avoiding an overstrict application of the provision made against the possible evil of a patent being taken for the sole purpose of depriving Canada of the use of a useful invention. The 28th section is also intended as a sort of protective policy in favour of Canadian labour. The Legislature has, certainly not without intention, provided for a kind of paternal tribunal, formed by the Commissioner of Patents, the natural protector of patentees, which intention can be no other than that every case should be adjudicated upon in a liberal manner.

The duty of this tribunal is, therefore, on one hand, after having satisfied itself of the facts, to apply the remedy if the mischiefs provided against by the statute have been really committed in intent or effect; and, on the other hand, to guard against the cruel injustice of inflicting such a punishment as the total destruction of an acquired and vested right, when no real damage was either intended or done. The common principle of justice which says that when there is no injury inflicted no damages are to be granted, and that when no offence has been committed no penalty is to be imposed, must govern this matter as well as the principle that no offender should be sheltered from the punishment for offence or injury perpetrated by him.

In order to arrive at a correct interpretation of the words *construction or manufacture*

of the invention, it is necessary to well understand and carefully consider the nature of the obligation thereby imposed.

As to Patents, it applies to *every Patent granted*; as to subjects, it applies to every conceivable object which may be invented or improved; as to persons who have the right to exact it, it applies to all inhabitants of the Canadian Confederacy; as to extent of territory, it applies to the whole Dominion from Ocean to Ocean, and to every Province and locality therein; as to time, it applies to 13 out of 15 years of the longest Patent and to 3 out of 5 years of the shortest.

This simple enunciation of the nature of things to which the law refers, is sufficient to demonstrate that the law maker could not have had in contemplation to force, on penalty of forfeiture, the Patentee to actually fabricate his invention with his own capital, within specific establishments, with his own tools, and to keep stock for every moment of the existence of his privilege; and where? All over the Dominion, and whether he has purchasers or not.

The Patent might be for a process, for an object to be used in conjunction with something else or for an improvement on another Patent still in existence; it might be for a railway bridge, switch, or spike; it might be for a mail bag, and in all these cases it does lie within the power of others than the Patentee to say whether the invention shall or shall not be used at a given time or at any time.

Therefore the real meaning of the law is that the Patentee must be ready either to furnish the article himself or to licence the right of using, on reasonable terms, to *any person desiring to use it*. But again that desire on the part of such a person, is not intended by the law to mean a mere operation or motion of the mind, or of the tongue; but in effect a *bond fide* serious and substantial proposal, the offer of a fair bargain accompanied with payment. As long as the Patentee has been in a position to hear and acquiesce to such demand and has not refused such a fair bargain proposed to him, he has not forfeited his rights.

If it were necessary to furnish a collateral proof of this intention of the Legislature,

within the law itself, of requiring on the part of the customers an actual substantial demand or request accompanied with a settlement of royalty, it would be found in Section 21,* in which an exception to that obligation of demanding is made in favour of the Government, which is, by way of derogation to the general rule, allowed to make use of all inventions without going to the patentee, even during the two years delay, free of any blame for infringement, by resorting to a special and an exceptional mode of settling upon the price to be paid to the Patentee.

The same rules of interpretation apply to the provision of the Act as regards importation. The law says that the Patent shall be void if after twelve months of its being granted, "the Patentee, or his assignee or assignees, for the whole or a part, imports or causes to be imported into Canada, the invention."

The evil aimed at by the Legislature, in ordering the penalty of forfeiture, is the importation of patented inventions being made to the detriment of their being manufactured in Canada. If that was done, even by other persons than the Patentee or his assignees but with his consent, that would call for the application of the remedy, although the mere wording of the law might be pleaded as exonerating the Patentee from the responsibility of having actually imported or caused to be imported. On the other hand the actual importation of a few machines, as models, or for the purpose of bringing the usefulness of the invention before the eyes of the Canadian public and thereby hastening the working of the Patent in Canada, could not be reasonably taken as being the commission of the evil of injuring the manufacturing interests of the country. It may be, on the contrary, in some given cases, the best and promptest way of benefiting Canada with a new and yet unappreciated invention; and the importation of few models then would be fostering the object of the law which is—that Canadian industry and Canadian labour should, in the shortest possible time, be made to profit by new inventions.

* SECTION 21.—The Government of Canada may always use any Patented invention, paying to the Patentee such sum as the Commissioner may report to be a reasonable compensation for the use thereof.—*The Patent Act of 1872.*"

The words *carry on in Canada the construction or manufacture* with their context cannot therefore mean any thing else than that any citizen of the Dominion, whether residing in Prince Edward Island, in British Columbia, in Ontario, Quebec or elsewhere on federal soil, has a right to exact from the Patentee a licence of using the invention patented, or obtain the article patented for its use at the expiration of the two years delay, on condition of applying to the owner for it, and on payment of a fair royalty. The words *imports or causes to be imported into Canada* cannot mean any thing else than injury to home labour, which injury if actually done by or with the connivance of the patentee, most decidedly entails forfeiture of his Patent.

It has been argued in view of meeting the above mentioned interpretation of the words *construction or manufacture*, that the statute has foreseen the difficulties of special cases and has provided for them by subsection 2 of section 28, in giving to the Commissioner the power to extend indefinitely the delay in such cases as, for instance, would be illustrated by a Patent granted for a graving dock.

The purport and effect of subsection 2 is totally different from and even at variance with the meaning given to it in this argument. A delay does not at all remedy the condition of impossibility in which a Patentee is to establish at any time manufactories accessible to a population scattered over a territory which extends from ocean to ocean, with an area amounting to millions of miles; it does not do away with the impossibility at any time, of keeping articles in stock without purchasers, and so forth.

But this is not all;—subsection 2, construed as is proposed by the said argument, would lead to a positive defeat of the intention of the Legislature, which clearly is, that the Patentee must supply Canadian citizens with the invention when requested to do so by any one, on payment of a reasonable price or royalty.

The effect of the delay of two years and the effect of any further extension thereof means, that during that time the Patentee is permitted to withdraw entirely (the Government excepted) the use of his invention from the Canadian public, that he can refuse the use

of it to all and every one, under any and every circumstance. It follows that the granting of a long delay would amount to depriving, during such time, Canadian industry of the use of such invention, which could not be imported and which the inventor would not be bound to furnish on any condition. As it is logically necessary to carry the argument to the extent that there are many cases in which the difficulty being of all times, the delay, of necessity, should be carried to the whole duration of the Patent, it amounts to saying that the Commissioner of Patents is empowered to grant, and in fact forced to grant, that Canada should remain for a long period of time, or the whole period of the duration of patents, *quoad* the utility of certain inventions, in a state of industrial inferiority as compared with all other countries.

Another proof of the total error of the argument is, that the whole of the 28th Section applies to "*Every Patent granted*," precluding, in the very terms of the law, the idea that it intended to deal with cases; nay, expressly enacting that the same provisions are to apply equally to all Patents, as a matter of course, in the legitimate sense which is naturally and equitably suggested by the nature of things in matters of inventions and patents of inventions.

[Concluded in next issue.]

COUR DE CIRCUIT.

MONTREAL, 11 avril 1885.

Coram MOUSSEAU, J.

BERNARD V. LALONDE.

Hôtelier—Voyageur—Dépôt volontaire—Responsabilité.

Jugé :—1o. *Que l'hôtelier n'est pas responsable de la perte d'une valise laissée dans son hôtel par un voyageur, lorsque celui-ci n'est pas son hôte, ne loge pas chez lui et ne fait qu'entrer dans son hôtel pour y déposer sa valise pour quelques instants.*

2o. *Qu'un tel dépôt n'est pas un dépôt nécessaire, mais volontaire.*

Le demandeur réclamait du défendeur la somme de \$39, prix et valeur d'une valise et des effets contenus dans cette valise, laquelle il avait déposée dans l'hôtel du défendeur.

Et le demandeur alléguait spécialement que le dépôt de ladite valise chez le défendeur, qui est hôtelier licencié, était un dépôt nécessaire dont ce dernier était responsable et qu'il était, en loi, tenu de lui rendre ce dépôt.

Il alléguait de plus, avoir confié d'une manière toute spéciale, au défendeur, la valise en question et que celui-ci s'en était chargé et avait promis en prendre un soin particulier; mais qu'en dépit de cet engagement formel il refusait et avait toujours refusé de lui rendre le dépôt ainsi confié à sa garde. Et le demandeur concluait à ce que le défendeur fût condamné à lui rendre la dite valise et son contenu ou à lui en payer la valeur, savoir, la dite somme de \$39.

Le défendeur a répondu à cette action d'abord par une défense au fond en fait, et en second lieu, par une exception péremptoire en droit par laquelle il allègue :

Qu'il est vrai que le défendeur est hôtelier licencié et que comme tel, il est responsable des effets de ses hôtes; mais que le demandeur ne s'est jamais retiré chez lui et n'y a jamais pensionné.

Que le défendeur ne connaît pas le demandeur et qu'il ignore si ce dernier a laissé chez lui les objets mentionnés en sa déclaration; mais que s'il les y a laissés, il l'a fait à ses risques et périls, sans que le défendeur ou ses employés se soient chargés d'en prendre soin.

Que le demandeur n'étant pas l'hôte du défendeur, le dépôt qu'il a pu faire n'était pas un dépôt nécessaire et qu'en conséquence le défendeur n'est pas responsable de sa perte. Et pour ces raisons le défendeur concluait au renvoi de l'action.

L'enquête démontra que le demandeur n'avait jamais été l'hôte du défendeur, qu'il n'avait pas logé chez lui et n'y avait fait aucune dépense dans l'occasion en question; mais que l'un des employés du défendeur avait permis au demandeur de mettre sa valise dans une chambre où l'on plaçait d'ordinaire les malles et valises des voyageurs. Et lorsque le demandeur réclama sa valise, il fut impossible au défendeur de la trouver et de la lui rendre.

Il fut également prouvé que dans cette occasion, le défendeur n'avait rien exigé du demandeur pour lui permettre de laisser chez lui ladite valise et que ce service était

de pure obligeance et tout à fait désintéressé de la part du défendeur.

A l'audience, le demandeur soutint que le dépôt en question était un dépôt nécessaire dont le défendeur ne pouvait éviter la responsabilité; et au soutien de ses prétentions il invoqua les arts. 1804 et 1814 du C. C. Il cita de plus 15 Dalloz, Jurisprudence Générale, vo. Dépôt-Séquestre, p. 493, No. 182. Et le même auteur, vo. Dépôt-Séquestre, p. 486, No. 160, qui s'exprime comme suit: "Il a été jugé à cet égard, 1o. que l'aubergiste est responsable des effets placés dans la cour de son auberge par un voyageur qui ne loge pas chez lui, même quand cette cour est assujettie à un droit de passage au profit d'un tiers. 2o. Que si l'aubergiste prétendait avoir reçu du voyageur ses effets à un autre titre que celui de dépôt, ce serait à lui à prouver son allégation...."

De son côté, le défendeur cita 27 Laurent, Nos. 98 et 99. 15 Dalloz, Jurisprudence Générale, vo. Dépôt-Séquestre, p. 487, Nos. 163 et 180, et l'art. 1200 du C. C.

Et la Cour, après avoir délibéré, déclara que le dépôt en question était un dépôt volontaire, fait aux risques et périls du demandeur, et, en conséquence, renvoya son action avec dépens.

Action renvoyée.

Préfontaine & Lafontaine, procs. du demandeur.

Duhamel, Rainville & Marceau, procs. du défendeur.

(J. G. D.)

RECENT U. S. DECISIONS.

Hotel-keeper — Guest—Small-pox—Negligence—Liability.—A hotel-keeper who, with knowledge of the prevalence of small-pox in his hotel, keeps it open for business, and permits a person to become a guest without informing him of the presence of the disease, will be liable for any damages caused by the guest's contracting the disease without any contributory negligence on his part. Supreme Court of Iowa—*Gilbert v. Hoffman*.—23 N. W. Rep. 632.

Railroad—Negligence.—The duty of a railroad to transport passengers and its liability for a breach thereof, arising from the negli-

gence of its servants, does not arise alone from the consideration paid for the service, but is imposed by law, even where the service is gratuitous. A gratuitous bailee must answer for goods left in his charge if lost through gross negligence. It is enough to fix the liability of a railroad for injuries occasioned by the negligence of its servants, that the passenger be lawfully on the train, whether by reason of having paid his passage money or by permission or invitation of officers or agents of the company. Question of liability does not depend upon the uses to which the train is usually devoted; and, where there are no rules of the company prohibiting it, or even if there be such rules, and the officers making such rules relax or dispense with them in a particular instance, and passengers are taken on trains or cars not generally used for their transportation, or with the expectation of paying fare when demanded, they are lawfully upon the train, and the company owes them the duty of safe transportation. The petition alleging that hand-cars were sometimes used by the company to transport employees, and that plaintiff, with others, took passage on one, at the invitation of the company's agent, to go to a place where the corpse of a man had been found on the railroad track, plaintiff being one of the jury of inquest, and that, by the negligence of the company's servants in the management of said car, he was injured, stated a good cause of action, not subject to demurrer.—*Prince v. I. & G. N. R. R.*, Sup. Ct., Texas; Chi. Leg. News, June 6.

GENERAL NOTES.

The Supreme Judicial Court of Massachusetts holds, in *Cowan v. Cowan*, that a libel for divorce may be maintained by the guardian of an insane person, provided sufficient cause be shown. The action was by the guardian of the wife, and the cause alleged and proved was desertion by the husband. This was held sufficient, and a divorce was decreed.

A correspondent points out that the Statute 47 Viet. c. 8, s. 3, merely states that "the courts cannot sit between the 30th June and 1st September," and that delays run as usual for procedure. This is quite true. Art. 463 of the Code of Procedure has not been repealed, and so, intentionally or otherwise, there is one vacation for judges and another for lawyers. We may add that in Montreal all pleadings, &c., presented are being received at the prothonotary's office up to the 9th inclusive.

The Legal News.

VOL. VIII. JULY 11, 1885. No. 28.

The knotty cabman's case (8 L. N. pp. 106, 122, 177)—*Regina v. Macdonald*—was re-heard before thirteen judges on Saturday, the 20th June, and the majority were of opinion that the conviction was right. The *Law Journal*, of London, inclines to the opinion of the dissentient judges, which certainly seems to be technically the more correct. Our contemporary observes:—"At common law there could be no larceny without trespass. A statute says that a bailee who fraudulently converts to his own use goods bailed to him may be convicted of larceny. An infant fraudulently converts to his own use goods of which, if he had not been an infant, he would be bailee. Is he guilty of larceny? The answer seems to be in the negative. There is no dilemma. He is not guilty at common law, because he has committed no trespass, and he is not guilty by statute, because he is not a bailee. His proper legal description is that of licensee, and if it had been decided that a licensee who does something inconsistent with the license becomes a trespasser and, if a fraudulent intent be added, a thief, the decision would have been intelligible. But the various *reducciones ad absurdum* put several times by the judges do not help to a conclusion. They would help if the law of larceny were based on reason, but it is not. It had its origin in days when most crimes were crimes of violence, and it has been toned down by the judges in days when it was a hanging matter. The suggestions made by the learned judges in the course of the argument were valuable to the Legislature, but did not elucidate the question in hand. Some positions of law, however, seem to have been assumed without warrant. It appears to have been supposed that if a chattel is lent to an infant, and he sells it, there would be no remedy unless he was guilty of larceny. He would, however, be guilty of a conversion, upon which he could be sued. The assemblage of a dozen judges

to decide a point of criminal law greatly imperils its proper decision. They are apt to treat the matter from the point of view of common sense and convenience rather than law, and support one another in so doing. They become less a forum than an assembly of gentlemen settling among themselves what is right and wrong."

The American Bar Association at the approaching meeting, which takes place at Saratoga on the 18th of August, propose to take up rather a formidable subject—the delays in the administration of justice. David Dudley Field, the chairman, has issued the following series of questions to be answered by members of the Association in the several States:—

I. How many judges of courts of record are there in your State?

II. How many lawyers are there?

III. What is the average length of a defended lawsuit from its beginning in the court of first instance to its end in the court of last resort?

IV. What is the average expense in costs and counsel fees of such a law-suit, to each party?

V. How many appeals are allowed in the same suit?

VI. How many volumes of reported cases are annually published, and how many decisions are reported in the last volume of each court?

VII. What is the number of affirmances and reversals reported in this last volume?

VIII. Is there delay or uncertainty in the judicial administration of your State, and if so, what in your opinion is the cause and what is the remedy?

THE WORD "UNMARRIED."

A decision of some little practical importance to maids, wives and widows, and of considerable interest to draftsmen and others who may wish to write good and clear English, is to be found in the case of *In re Sergeant, Mertens v. Walley*, 54 Law J. Rep. Chanc. 159, reported in the February number of the *Law Journal Reports*. It involved the meaning of the word "unmarried," used in a bequest made to certain ladies, and coming into operation after the death of a tenant-for-life. Two questions were raised—first, whether the condition referred to was the condition held at the time of the death of the testator or at the death of the tenant-for life? and second, and more important, whether "unmarried" meant never having been married, or not being married? Upon

the second question purists in the use of English will probably find a way of cutting the knot. Their answer will be that it means neither. They will object, in the first place, to the use of the word "unmarried" at all; and in the second place, they will say that if it means anything it means divorced. The prefix used reverses the meaning of the word to which it is prefixed, and does not act as a simple negative. If "untied" means with the tie unravelled, "unmarried" means with the marriage dissolved. But the draftsmen of wills are not sticklers for good English. They have an English of their own, which in general is good enough for their purposes if it is not obscure. If they avoid the word "unmarried" it is for its obscurity, even in its conventional sense, and not for its radical deficiencies in etymology. In any case, the draftsman had used the word, and it remained for the Court to give a meaning to it.

Mr. Sergeant, by his will dated June 22, 1846, directed his trustees to invest certain moneys, and to pay the income to his wife for life, and after her death to divide two-thirds of the principal "equally among the surviving unmarried daughters" of three of his wife's sisters, whom he named. The testator died a few days afterwards, and his wife lived until July 20, 1883. At the time of her death there were living four daughters of her three sisters mentioned in her husband's will. The two first were not married at the death of their uncle, the testator, but were married, with husbands alive, at the death of their aunt. The next, Mrs. Walley, was not married at the death of her uncle, but before her aunt died had married and become a widow, and the remaining daughter had never been married at all. The history of the family, in fact, seems to have been arranged with a view to ring the changes on the several meanings of the word "unmarried." The first two ladies, of course, could not take any benefit unless the description referred to the time of the testator's death, at which time they were "unmarried" in both senses, although at the time of their aunt's death they were not "unmarried" in any sense, including the unconventional sense alluded to at the outset. So little

hopes had they of persuading the judge that the testator referred to that period of time, that they were not represented by counsel, and gave up their chance. The last of the daughters mentioned, who had never been married at all, did appear by counsel, who, of course, was "not heard," as his client answered all the possible meanings of the word, and was unmarried in both senses both at the death of her uncle and the death of her aunt. There remained the lady who had married and become a widow between the deaths of her uncle and her aunt. This lady was, of course, unmarried at the uncle's death, and her counsel suggested that this fact was enough. This, however, could hardly be, as "surviving" evidently meant surviving the aunt. He, therefore, fell back on the contention that "unmarried" meant, not "never having been married," but "without a husband." This view, also, Mr. Justice Pearson was unable to take. In a colorless will, said the learned judge, the word meant never having been married, although in certain cases the Court had, in order to prevent the intention of the testator being defeated, interpreted it to mean without a husband. He was unable, however, to see that it meant without a husband in this instance, and he added, "The reason why the unmarried daughters are selected and the married daughters left out, I think, is that when a lady who is a spinster marries, some provision is usually made for her, either by her own relatives or by her husband." In other words, the testator meant to confine his bequest to nieces who had never been advanced to matrimony at all, which was probably his intention, and, undoubtedly, in accordance with the conventional meaning of the word.

The advice deducible from the case to draftsmen about to use the word "unmarried," is not to use it at all. The word is indefensible etymologically, and obscure even in its vulgar use. But what is the draftsman to use in its place. Those who are careless of style use the periphrasis "not having married," which is clear but clumsy. There seems no reason that the good old English word "spinster" should not be used, being as it is the legal title of a person who is

neither wife nor widow. If the testator's will had run "equally among the surviving spinster daughters of my sister-in-law," it could not have been suggested that widowed daughters were included. The past participle of the English language must, however, if used like an adjective, always lead to obscurity, and to use it with a negative prefix intended to have the effect of "not," simply is to be guilty of a solecism as well.—*Law Journal* (London).

SUPERIOR COURT.

SHERRBROOKE, May 5, 1885.

Before BROOKS, J.

LA BANQUE NATIONALE V. THE EASTERN
TOWNSHIPS BANK.

Cancellation of Mortgage on Insolvent's Property.

PER CURIAM. This is an action to compel radiation of a pretended hypothec created by the registration of defendant's judgment against one W. W. Beckett for \$29,202.72, interest and costs, alleging that said W. W. Beckett is indebted to plaintiffs in the sum of \$33,000 for a note given them, and was so indebted in November last. That on the 19th November last (1884), being insolvent, he made a transfer of his property to one Darling for the benefit of his creditors; that they, plaintiffs, had then sued him, their action being returned on the 6th of December; that on the 11th of December defendants also sued him for their debt (\$29,200) and on the 12th of December obtained judgment upon their confession, and registered this judgment against the property mentioned in the return; that this was done to obtain an undue preference, and they seek its radiation on the ground that it gave no preferential hypothecary claim to defendants.

The defendants have not pleaded, but content themselves with stating at the argument that, under Art. 2023, C. C., if Beckett were insolvent no hypothec was acquired by the registration of their judgment, but that they, defendants, had a right to enregister; the plaintiffs cannot now ask its radiation; they are premature; they should have waited; and if defendants sought to obtain an advantage, then they must contest, and

defendants were not bound to radiate on a notarial demand.

Articles 2148 and 2149, C. C., do not apply. What is registration? It is a claim of hypothec. Articles 2026, C. C., *et seq.*, declare that legal hypothecs only affect properties mentioned in notice. (Notice in Consolidated Statutes, p. 388.) This notice must be given by defendants. That is, they ask that the property described may become bound and affected by the general hypothec under their judgment.

The facts are undisputed. Beckett was insolvent; he was sued by the plaintiffs for a large amount, some \$33,000. He made an assignment on November 19th, declaring himself insolvent. The defendants sued him on the 11th, and on the 12th, on his own confession, judgment was rendered and registered by defendant asking preference by judicial hypothec. The plaintiffs complain of this, and ask that the pretended hypothec should be radiated.

The codifiers have not changed the law from what it was under chapter 27 of the Consolidated Statutes. They say (page 62, vol. 3) that they have added a few articles and suggested a few amendments; that it was on this article only they deemed it necessary to offer any special remarks. They do not refer to this case, but to the Articles 2148-49 and section 42 of chapter 37 Consolidated Statutes of Lower Canada, and Article 2159 Code Napoléon.

By chapter 37, C. S. L. C., section 42, the right of action seems to be limited to the debtor, but our code says it may be urged by any party interested.

The defendants claim a mortgage. The plaintiffs say: "You have none, but your claim is prejudicial to us; cancel it." The defendants say they had a right to enregister. What does this mean? That they had a right to a mortgage on the realty. Is this true? It is not. Their claim is that of a mortgage created by them by registering a judicial hypothec which does not exist. They had no right to it. But they say: "You cannot now claim radiation." (See 31 Laurent, p. 149, sec. 174, pp. 154-5, sec. 179, pp. 157 and 182; *La Banque Jacques Cartier v. Ogilvie*, 19 L. C. J., p. 100, Court of Queen's Bench, 1874.)

The defendants say that registration was not effected without right or irregularly. It had no effect. Their claim as a judicial hypothec is unfounded. The demand of radiation was made and it was not consented to, and the plaintiffs are entitled to have it done.

Judgment for the plaintiffs declaring the pretended hypothec radiated, and that defendants should pay costs of certificate of registration and costs of protest, &c.

Panneton & Mulvena, for plaintiffs.
Hall, White & Cote, for defendants.
(L.M.P.)

PATENT OFFICE.

OTTAWA, February 15, 1877.

Before THE DEPUTY OF THE MINISTER OF AGRICULTURE.

BARTER V. SMITH.

(Concluded from page 215.)

The views taken here on the question at issue are fully sustained by the construction and interpretation put on similar or identical legal enactments in other countries. The jurisprudence established, and the doctrine laid down by Jurists and Patent Experts in countries where the Patent laws contain the same dispositions as ours about *manufacturing* and *importing*, appear, from extensive reading on the subject, unanimous. It will be sufficient to enter into a short exploration of this ground to prove the assertion of such common consent of nations in the matter.

In England the Patent laws do not contain the same prescription as our statute presents, and no *specific* provision is made to secure to the public the use of the invention, or to home labour the benefit of its working, but there exists in the present Letters Patent issued in England a proviso which shows, by analogy, what doctrine prevails on the general question of the obligations of the Patentee, when he is bound to furnish his invention, under pain of forfeiture.

Among the circumstances that cause English Letters Patent to "*cease, determine and become void*," is the following: If he, the Patentee, "*shall not supply or cause to be supplied for our service all such articles of the said invention as he shall be required to supply by the officers or commissioners administering the Department of our ser-*

vice for the use of which the same shall be required, in such manner, at such times and at and upon such reasonable prices and terms as shall be settled for that purpose by the said officers.. &c." This shows that it is not supposed that the legitimate obligation of the Patentee towards the customer is to keep open shops, to keep stock, but to supply the invention, only when requested to do so, by a formal demand accompanied with a settlement of the Royalty.

Similarly to the laws of England, the present Patent laws of the United States do not contain the condition of lapsing for reason of non-manufacturing or of importing: the absence of such dispositions from the Patent Acts of those two prominent manufacturing countries is, it must be conceded, antagonistic to the idea of Draconian interpretation of the said conditions where they do exist.

The obligation of manufacturing in the United States did exist for a certain time: it was introduced by a short Act in 1832; this Act was repealed by the Patent Act of 1836, but a provision of the kind was maintained in the last mentioned Statute. By the 15th section, the defendant in an action of damages, was permitted to plead the general issue: at the end of the enumeration of defects, we read:—"...or that the Patentee, "if an alien at the time the Patent was granted, has failed and neglected, for the "space of eighteen months from the date of "the Patent, to put and continue on sale to "the public, on reasonable terms, the invention or discovery for which the Patent "issued; in either of which cases, judgment "shall be rendered for the defendant with "costs."

The provision of this clause was invoked in one case of an assigned alien's rights (*Tatham v. Lowber*).^{*} Messrs. Justices Nelson and Betts, State of New York, decided.—

"That even if the plaintiffs took their "right with the condition attached to alien "Patentees, yet they had satisfied the Statute: that they need not prove that they "hawked the patented improvement to obtain a market for it, or that they endeavored to sell it to any person; but that it "rested upon those who sought to defeat the

^{*} Blatchford C. C. Vol. II., pages 40 to 51.

"Patent to prove that the plaintiffs neglected
"or refused to sell the patented invention
"for reasonable prices when application was
"made to them to purchase."

The French legislation, as does the legislation of most countries, contains conditions similar to those of the 28th section of our "Patent Act of 1872."

The doctrine and jurisprudence adopted on the subject is amply summed up in the quotations of two eminent writers on Patents and Patent laws, which will follow, after citing the text of the law.

The French law reads thus :—Article 32.
"Shall be deprived of all his rights ;
"..... 2. The Patentee
"who shall not have worked his invention
"in France, within a delay of two years from
"the date of the signature, or who shall suspend his operations for two consecutive years
"unless he show cause for such inactivity. 3.
"The patentee who will have introduced into
"France articles manufactured in foreign
"countries similar to those guaranteed by his
"patent."

It must be remarked that the last proviso, at the end of paragraph 2, of the French law is similar in effect to the means adopted by our statute for making the non-manufacturing a condition of nullity to take effect only when rendered applicable by an administrative decision. The nullity enacted by the French law can be pleaded in Courts; the nullity enacted by our Act is conditional upon a decision of the Minister of Agriculture, who alone is to say whether the condition is to be enforced or not.

Renouard, after quoting Arago's speech, in the *Chambre des Députés*, (1844) against the stringency of the then proposed legislation, goes on to explain how it is to be understood :—

"The tribunals will appreciate, he says, according to circumstances, whether it has
"been worked or not; whether or not the
"working has been interrupted; if the reasons
"of not working are sufficiently justified." (*)

This was said by a magistrate of the highest order and a specialist, in anticipation of the judicial decisions which afterwards con-

(*) Renouard—*Traité des Brevets d'Invention*, Paris, 1844—Page 243.

firmed his views of the matter; many years after, Bédarride, reviewing the jurisprudence established on the subject, recapitulates it, and exposes the doctrine in the following sentences :—

"The spirit of the law is therefore indubitable. It intends to punish only voluntary, premeditated, and calculated inactivity." (1)

It is to be remarked that Bédarride is not a loose but rather a strict interpreter of laws; he holds that the laws of France do not admit of prætorian interpretation, and are not to be mitigated by the Courts, no matter how severe and hard they may be. Bédarride again says :—

"The voidance of paragraph 2 of article 32, touches only voluntary inactivity. The law wishes to punish for inaction, the only one who has willingly remained idle. *It would have been really too unjust to extend the penalty to the one who has abstained on account of circumstances independent of his will.*" (2)

As regards the importation, Bédarride says :

"The prohibition having for its unique object the protection of national labour, it would have been unreasonable to extend it to cases in which such protection could not be injured." (3)

"The judicial authority, exclusively inspired by this spirit, refused to apply the penalty of forfeiture, when the importation, although non-authorized, was not in its nature susceptible of damaging national labour." (4)

"It is proper to decide to-day, as it was decided by the courts of Douai and Paris in 1846 and 1855. Should not be considered as violation of the prohibition of the law, the importation of a few specimens of the articles or the importation of machines, having no other object in view than to find either associates or licences for the invention." (5)

It would only be a matter of time and labour to extract similar authorities and decisions from the records of other countries where the laws are either identical or similar to our

(1) Bédarride—*Commentaires des lois sur les Brevets d'Invention. Marques de Fabrique et de Commerce*, &c., &c. Paris, 1869—Volume I, page 448.

(2) Bédarride—Vol. I. p. 450.

(3) (4) (5) Bédarride—Vol. I, page 455—467—463.

statute in this respect. All this shows, to borrow the very words of Renouard, "how the practice of nations solves, by common sense and experience, the questions raised by necessity....."

The question of doctrine having been thus established, it remains to examine the facts of the case to confront them with the meaning of the statute. The evidence adduced is ample to give any one a clear and unmistakable knowledge of the state of affairs.

As to manufacturing, it is proved that none of the respondent's inventions were put up in Canada within the time prescribed; but no proof is given that he has refused to furnish them to anyone at any time; on the contrary, it is shown in the clearest manner that he has not been requested by any one to be supplied with them, during the time of inactivity.

As to importation, it is proved that the machines imported at Thorold by Messieurs Howland and Spink, more than twelve months after the date of the patent, are of Smith's invention No. 2257; that Smith was neither the consignor nor the consignee, nor the owner thereof; that he did not actually import them but that he consented to the importation, which action amounts to causing them to be imported. It is clear that Smith's consent in this instance was not intended to defy the law, that it did not cause any appreciable injury to Canadian industry, but had for its object to bring the merits of his patents and process before the Canadian public, with the honest intention of manufacturing in Canada as his efforts to introduce his process in Lawson's mill prove.

The disputant, aiming at the process of milling patented under No. 2409, has tried to connect patent No. 2257 with patent No. 2409, as being necessarily dependent on each other in the way of cause and effect or rather object and means, but has failed in that, and by his evidence, has, in fact, proved the contrary of his proposition, in establishing that Smith's process does not require any special plant or machinery; but can be added to any mill by ordinary tools and workmanship and with ordinary materials, which is, besides, made plain by a careful study of the patents.

The disputant has also tried to prove un-

willingness on the part of the Patentee to furnish the Canadian market, at the same time that an active demand is alleged to have existed in Ontario for several years for such processes of milling as Smith's, an assertion which is poorly sustained by Barter's third declaration and his own Trade Circular (hereinbefore analysed), and by the fact that one of the witnesses who makes this assertion, Mr. Lawson, had no Middlings Purifiers of the sort in his own mill at Thorold, in May, 1876, when he refused the offer made by Smith to himself (Lawson) to have one put up for him, he having objected to the ordinary price charged for Royalty.

The disputant insisted on the point that the three petitions of the respondent (documents 4, 5 and 6 hereinbefore analysed,) are a virtual admission of his having failed to comply with the exigencies of the statute. It would be hardly fair to take even an unconditional admission of the sort, made under the circumstances and in error, as carrying with it the necessary destruction of the patent. The petitions referred to are not, however, an admission of that kind: the Patentee, after a statement of facts, says he "submits that his acts as aforesaid are a sufficient compliance with the terms of the said 28th section of the Patent Act of 1872"..... he has been unable, "for reasons aforesaid to comply literally with the terms of the said section," and he concludes by asking for a "declaration that the said patent has not become forfeited," and also for "an extension of time to commence the manufacture."

It is clear that the Patentee was conscious of having complied with the spirit of the law, but was apprehensive of the interpretation given to the words on account of threats. He asked for an extension of delay, a long time after the expiration of the statutory delay, which extension can, of course, be granted by the Commissioner only as a continuation (without interruption) of the respite of which it is the mere prolongation. When the statutory delay has expired, a patent then is either voided or in operation, according to the spirit of the law, and no other proceeding on the point in question can intervene, unless a dispute is raised.

These few remarks seem sufficient to show the real meaning of this incident, and to prove that the fact of the Patentee having presented the said petitions and the terms of these petitions cannot, in the least, affect his position.

The Counsel of the disputant has argued in favor of the conclusions of his dispute from an official answer given to a letter written to the Patent Office at his (the Counsel's) advice *pendente lite*. As this is a matter of constant occurrence, and as it gives the occasion of showing how different is necessarily an answer to a question put in the abstract from the decision of a case presented with all its bearings and particulars, it is of importance for the Patent Office and for the public to dispose of the argument.

The letter written contained the following question:—"Is it considered as 'construction' sufficient to hold the patent, if an article composed of various parts is imported in parts and put together and constructed in a Canadian manufactory?"

The letter in answer was as follows:—"You ask if the manufacturing clause of the Patent Act would be complied with by importing the whole of the parts of a machinery to be only put together in Canada? Evidently this would not be in compliance with the requirements of the law."

To such an interrogation no other than an answer based on the supposition of a breach of the law could be safely given. But if, departing from the abstraction of the above given question, the investigation were made as regards a certain patent, under specific circumstances, the conclusion might be widely different from the general answer. In fact, it is not difficult to imagine a case in which the importation of all and every one of the component parts of an invention, to be simply put together in Canada, would not be an importation in the meaning of Section 28 of the Patent Act, but, on the contrary, would be the only means of obeying the Statute as to manufacturing, and therefore to all intents and purposes, in full compliance with the spirit of the law and the nature of the contract: such would be, for example, the case of a Patent granted for a composition of matter, all the ingredients of which would

be products not to be found in the country; a compound of exotic gums and extracts, for instance, or a medicine composed of portions of tropical plants.

This is sufficient to illustrate the difference of cases, every one of which must stand on its own merits, viewed in the light of the facts confronted with the spirit of the law.

The conclusion is, that the respondent having refused no one the use of his inventions, and that the importation, assented to by him to be made, being inconsiderable, having inflicted no injury on Canadian manufactures and having been so countenanced, not in defiance of the law, but evidently as a means to create a demand for the said inventions, which the Patentee intended to manufacture and did, in fact, offer to manufacture in Canada, he has not forfeited his Patents.

Therefore, George Thomas Smith's Patents No. 2257, for a "Flour Dressing Machine," No. 2258 for a "Flour Dressing Machine" and No. 2409 for a "Process of Milling" have not become null and void under the provisions of Section 28 of "The Patent Act of 1872."

JURISPRUDENCE FRANÇAISE.

Compensation—Société en nom collectif—Dette de la société—Créance d'un associé—Faillite de la société—Absence de réclamation directe contre l'associé.

La compensation entre deux obligations, également liquides et exigibles, ne peut avoir lieu, de plein droit, qu'autant que le créancier de l'une des obligations est débiteur personnel et principal de l'autre obligation, et que, réciproquement, le créancier de cette dernière obligation est débiteur direct et personnel de la première.

Spécialement les associés en nom collectif, bien que tenus solidairement des obligations de la société, n'en sont tenus cependant que subsidiairement, à titre spécial, et en dehors des actions dont la société peut être elle-même principalement l'objet.

En conséquence, le créancier d'une société en nom collectif ne peut considérer comme compensée, de plein droit, sa créance sur la société avec la somme dont il peut être débiteur de l'un des associés, tant qu'il n'a pas élevé une réclamation directe et personnelle contre cet associé.

Il ne peut donc, en ce cas, et alors qu'il n'a formulé aucune réclamation contre les associés personnellement, utilement opposer, du chef de sa créance contre la société, l'exception de compensation à l'action du syndic de la faillite personnelle de l'un d'eux, tendant au paiement de la créance du failli. (20 av. 1885, Cass.—*Gaz. Pal.*, 6 mai 1885).

1. *Testament olographe—Erreur de date—Rectification—Énonciations du testament insuffisantes*—2. *Fausseté de la date*—3. *Testament antérieur—Action en nullité du second testament*.

L'erreur de date, dans un testament olographe, alors d'ailleurs que les énonciations du dit testament ne permettent pas de la rectifier d'une façon certaine, équivaut à l'absence de date, et emporte nullité.

La fausseté de la date, alors même que l'écriture n'est pas méconnue, peut être justifiée, par la partie intéressée à faire prononcer la nullité du testament, par des preuves tirées des énonciations du testament lui-même, sans qu'il soit nécessaire de recourir à la voie exceptionnelle de l'inscription de faux.

Un testament olographe, nul pour erreur de date, ne peut valoir comme révocation d'un testament antérieur.—Le légataire universel, institué par un premier testament, est donc recevable à invoquer ce moyen de nullité contre un second testament, dont les dispositions auraient pour effet de faire disparaître ou de restreindre les effets de son institution.

(24 janv. 1885. *Cour d'Appel de Nancy. Gaz. Pal.*, 16 mai 1885).

RECENT U. S. DECISIONS.

Logs and Lumber—Conversion—Measure of Damages—Mistake.—Where logs are by mistake, and without any wilful or negligent trespass, cut from the land of another and hauled down and into a creek, several miles from the land, the measure of damages will be the value of the property on the land when cut, and not the value of the logs delivered in the creek. Supreme Court of Michigan, June 10, 1885.—*Ayres v. Hubbard*.

Physician—Privilege.—The New York statute making information acquired by the physician in his professional capacity privi-

leged and prohibiting its disclosure unless expressly waived by the patient, is founded on public policy, and its provisions can not be waived except as expressly provided. The prohibition remains in force after the death of the patient as well as during his life, and an executor or administrator is not a personal representative of the patient in such a sense as to authorize him to waive it. He represents simply in respect to rights of property. Court of Appeals, New York, April 14, 1885.—*Westover, Resp., v. Aetna Life Ins. Co.*, Applt.

GENERAL NOTES.

The death of Mr. Frederick A. Andrews, Q.C., occurred at Quebec, July 6. Mr. Andrews was a very old practitioner, and occupied an honorable position in the profession at the Ancient Capital. He was admitted to practice in 1825, and was the senior member of the firm of Andrews, Caron & Pentland. He was father of Judge Andrews who was appointed recently to the Superior Court bench. The deceased had attained the ripe age of 82.

Sir Hardinge Giffard is probably the first Lord Chancellor of modern times who made his reputation at the Court which now goes by the name of the Central Criminal Court, although many of his predecessors have distinguished themselves as advocates in criminal cases without, like him, having been constant attendants at the great Crown Court of the metropolis. The new Lord Chancellor bears the same name as the last Chancellor of William the Conqueror—a name borne also by four judges of the Plantagenet period (two of whom were Chancellors) and by the late Lord Justice Giffard.

When the Adams-Coleridge cases came before the Court of Appeal, the following memorandum of settlement was read by the Attorney-General:—"In relation to the causes of action in both actions, it should be left to (some person of eminence to be agreed upon) to determine whether compensation and of what amount should be paid to Mr. Adams. In addition to the above settlement, Mr. B. Coleridge, while unreservedly withdrawing the charges made in his letter of 11th December, 1883, states most positively that they were made on his part in perfect good faith on statements made to him, and Mr. Adams is happy frankly to accept such assurance. Lord Coleridge desires, and has long desired to say, that whatever construction may have been placed upon anything he has written or said, he thinks it due to Mr. Adams to withdraw any language which might be construed as casting imputations upon his character or motives. Lord Coleridge can not regard it as being necessary to say that he has never intended to cast any reflection upon the conduct of his daughter. It has been agreed that Miss Coleridge shall be replaced in the same pecuniary position as she would have been in if these misunderstandings had not arisen, Lord Coleridge being perfectly willing to make the suitable provision of £300 per annum by way of allowance to Miss Coleridge."

The Legal News.

VOL. VIII. JULY 18, 1885. No. 29.

For some time past there has been a good deal of grumbling and dissatisfaction in some legal circles in England, in consequence of the failure of law students, and even of barristers, to obtain admission to rooms in the Royal Courts where important trials were in progress, the excuse being that the Court room was full. The matter has become so prominent that it has elicited the following observations from Sir James Hannen, president of the Probate Division:—"I wish to say a word or two on a matter that has been pressed upon my attention. There is, of course, very great difficulty in making arrangements during the hearing of an important case like this for those who desire access to the court. I never found any real difficulty during all the years I have sat on the bench in satisfactorily dealing with such matters until I came into these buildings. It is now the constant subject of complaint, and I will therefore state, for the information of the public, the directions I have given as to the admission of the public to this court. They are very simple. This is a public court, admission to which the public are entitled to, provided there is accommodation. I have stated over and over again that while there is sitting accommodation, barristers and others are entitled to admission as a right. A person of whom I know nothing applied to me as a student for permission to be in the court. I informed him of the regulations I had laid down, and I am now told that he has been refused admission. To refuse him admission was an illegal act. I am informed that this person has misconducted himself. That must be the subject of enquiry elsewhere; but whoever refused him admission to this court while there was room, when he had my order, was guilty of an illegal act."

In our last issue, in a reference to the case of *Reg. v. Macdonald*, an error occurred which it is well to correct at once to avoid misapprehension. The paragraph should have read, "A case bearing a slight resemblance to the knotty cabman's case," &c. In the cabman's case, the title of which is *Reg. v. Ashwell*, a cabman received a half sovereign which the giver as well as the taker supposed to be a shilling, and afterwards, when the real value of the coin was known, the cabman retained it. In *Reg. v. Macdonald* the question was whether a minor who had purported to enter into a contract for the hiring and purchase of furniture, and who had sold it before he had paid all the instalments, could be convicted of larceny. Another question of larceny has just been decided by the Supreme Court of Illinois in *Stoker v. People*. The question was whether a constable who collects money on an execution, and fails to pay the same to the party entitled thereto, is guilty of larceny. The Court held in the negative. This decision, however, turned mainly upon Sect. 76 of the Criminal Code of the State.

The Insolvency bill submitted to the Dominion Parliament is one of the measures the consideration of which, owing to the length of the Session and the pressure of other business, has necessarily been deferred.

Mr. Christopher Robinson, Q. C., who has been connected with the work of law reporting in Ontario since the year 1852, and who has filled the position of editor-in-chief of the Law Reports since 1872, has just retired from that position, and has been succeeded by Mr. James F. Smith.

SUPERIOR COURT—MONTREAL.*

Judicatum solvi—Opposition—Contestation de l'opposition.—*Jugé*:—Que c'est seulement celui qui porte, intente ou poursuit une instance ou procès qui est tenu de fournir le cautionnement *judicatum solvi*, et tel est un opposant afin de distraire; que la partie qui conteste une opposition ne faisant qu'exercer les droits de son débiteur pour résister à l'opposition,

* To appear in full in Montreal Law Reports, 1 S.C.

se trouve dans le cas du défendeur dans une saisie-revendication, et par conséquent, ne doit pas le dit cautionnement.

Définitio : L'instance est la série des actes d'une procédure judiciaire ayant pour objet de saisir le tribunal d'une contestation, d'instruire la cause et d'obtenir finalement le jugement qui doit vider le débat. (En Révision)—*Park v. Rivard*, et *Meloche*, oppte.

Terrain enclavé—Passage—Servitude—Chemin de tolérance—Article 540 C. C.—Jugé :—Que pour qu'un terrain soit considéré enclavé dans le sens de l'article 540 du Code Civil, il faut qu'il n'ait aucune issue quelconque sur la voie publique, et qu'un simple chemin de tolérance non contestée est suffisant pour empêcher le propriétaire du terrain de réclamer un passage de ses voisins. (En Révision)—*Mainville v. Legault*.

Rapport d'expert—Assermentation de l'expert—Amendement du Rapport—Homologation.—Jugé :—Que lorsque le *jurat* constatant l'assermentation préalable de l'expert n'a pas été annexé à son rapport et qu'il est perdu, le rapport peut être amendé, avec la permission du tribunal, de manière à permettre à l'expert d'y ajouter son affidavit établissant qu'il a été dûment assermenté avant d'agir.—*Silcot v. Papineau dit Montigny*, et *Rielle*, mis en cause.

Cité de Montréal—Canaux d'égouts—Entretien—Dommages—Responsabilité—Discretion.—Jugé :—Que lorsque la Cité de Montréal est en possession de canaux d'égouts, quand même ces égouts n'auraient pas été construits par elle-même, elle est tenue en loi de les entretenir en bon état, et elle est responsable des dommages que peut causer leur mauvais état à ceux qui s'en servent ; en cela ses pouvoirs ne sont pas législatifs et elle ne peut prétendre qu'elle n'est tenue à cet entretien que suivant ses ressources pécuniaires et qu'il est laissé à sa discrétion.—*Leduc v. La Cité de Montréal*.

Bornage—Propriété déjà bornée—Respect aux juges.—Jugé :—Que lorsqu'une propriété a déjà été bornée, à frais communs et du consentement des deux parties, lesquelles ont signé le

procès-verbal, l'une de ces parties ne pourra demander à son voisin un nouveau bornage sans alléguer des raisons sérieuses montrant l'insuffisance ou l'irrégularité du premier.

—Jugement réformé quant aux frais, excepté ceux de *factum* qui a été rejeté du dossier parce qu'il contenait des observations irrespectueuses à l'égard du juge de première instance. (En Révision)—*Nadeau v. St. Jacques*.

Dommages—Détails—Accidents—Examen préliminaire de la personne blessée.—Jugé :—10. Que dans une action pour dommages causés par un cheval qui avait pris le mors aux dents, le défendeur, propriétaire du cheval, a le droit, avant de plaider, d'exiger du demandeur le détail des dommages réels qu'il réclame, *bill of particulars*.

20. Que dans une action de cette nature le défendeur, avant de plaider, peut obtenir de la Cour la nomination d'un ou de plusieurs médecins pour constater la gravité des blessures reçues et quels dommages il en résultera à la demanderesse.—*Lemieux v. Phelps*.

Capias—Cautionnement—Femme non sous puissance de mari.—Jugé :—Qu'une femme majeure et non sous puissance de mari peut légalement être offerte comme caution judiciaire.—*Slessor et al. v. Désilets*.

Offres réelles—Consignation—Animal errant mis en fourrière—Réponse spéciale—Réplique en droit.—Jugé :—10. Que lorsqu'un animal trouvé errant est mis en fourrière, le propriétaire de cet animal ne peut le réclamer sans avoir préalablement offert de payer l'amende et les dommages encourus, et sans renouveler les offres et consigner l'argent en Cour, s'il procède à la saisie-revendication.

20. Que des offres réelles suivies de consignation faites avec une réponse spéciale à un plaidoyer, n'ont aucun effet et ne peuvent être prises en considération par la Cour, lorsque cette réponse spéciale a été renvoyée sur réplique en droit.—*Brousseau v. Brousseau*.

Acte électoral de Québec—Liste des électeurs—Qualification—Rôle d'évaluation.—Jugé :—10. Que la qualification exigée par les sections 8 et 9 de l'Acte électoral de Québec pour

être électeur doit exister de fait au moment de la confection de la liste, et qu'il ne suffit pas qu'elle paraisse au rôle d'évaluation, ce dernier ne servant qu'à constater la valeur des biens-fonds.

20. Que lorsqu'un électeur a été par erreur mis sur la liste électorale sous une qualité qu'il n'a pas, mais que tout de même, au moment de la confection de la liste, il était réellement qualifié d'une autre manière, son nom ne doit pas être retranché de la liste des électeurs.—*Filiatrault v. La Corporation de la Paroisse de St. Zotique.*

Saisie-revendication — Description — Amendement — Exception à la forme. — Jugé :—Que dans une saisie-revendication, le demandeur peut régulièrement, avec la permission de la Cour obtenue sur requête, amender la description des effets saisis même avant le jour du retour de l'action, en en donnant avis aux autres parties.—*Legré v. Dufresne, et Ryan, mis en cause.*

Curatelle et tutelle — Aubain — Naturalisation. — Jugé :—Qu'un aubain ne peut être nommé tuteur ou curateur, et que, dans l'intérêt de l'interdit, il ne pourra se faire nommer à cette charge en se faisant pendant l'instance naturaliser sujet anglais, si son intention n'est que de demeurer temporairement dans le pays.—*Driscoll v. O'Rourke.*

Jugement de distribution — Homologation — Contestation — Article 751 C. P. C. — Jugé :—Que l'article 751 du Code de Procédure Civile, qui permet de contester un jugement de distribution même après son homologation, doit être interprété strictement; qu'il ne s'applique qu'au cas où la somme colloquée n'est pas dûe, mais non à celui où des questions seulement de privilège ou de droit de préférence peuvent être soulevées.—*Petit dit Lahu-rière v. Crevier, et Desjardins, créancier colloqué.*

Compagnie de chemin de fer — Responsabilité — Incendie — Précautions — Jugé :—Qu'une compagnie de chemin de fer est responsable des dommages qu'elle cause, lorsque les étincelles qui sortent d'une des locomotives qu'elle emploie pour faire tirer ses wagons mettent le

feu à un bâtiment près duquel il passe, et cela quand même la compagnie aurait pris toutes les mesures de garantie fournies par la science actuelle.—*Jodoin v. La Compagnie du Chemin de Fer du Sud-Est.*

Tierce-opposition — Exécution — Dépôt en Cour. — Jugé :—Qu'une tierce-opposition ne suspend pas l'exécution d'un jugement, et qu'un tiers-saisi, la tierce-opposition étant pendante, ne peut déposer en Cour le montant qu'il a été condamné de payer, mais qu'il doit le remettre au demandeur.—*De Bellefeuille v. Ross, et Stearns, T. S.*

SUPREME COURT OF CANADA.

Practice — Time for appealing under Supreme Court Act, section 25.—Judgment was pronounced in the Court of Appeal of Ontario on the 30th June, 1884. Vacation begins in that Court on the 1st July, and ends on the 30th August. On the 13th September the respondent (the appeal having been allowed) deposited \$500 as security for the costs of an appeal to the Supreme Court of Canada, and applied for leave to appeal. The Court of Appeal was of opinion that the security, not having been deposited within thirty days of the pronouncing of the judgment, was given too late, as the vacation did not interrupt the running of the time allowed by the statute (Sup. & Ex. Ct. Act, s. 25) for appealing.

The judgment of the Court of Appeal was not entered until Nov. 14, 1884, the delay being occasioned by a substantial question affecting the rights of the parties having arisen on the settlement of the minutes. This question was discussed before one of the Judges and subsequently before the full Court before being finally determined.

On the 27th November, 1884, the respondent in the Court of Appeal applied to the Judge of the Supreme Court of Canada, in Chambers, for leave to give security under sect. 31 of the Supreme Court Act, as amended by sect. 14 of the Supreme Court Amendment Act of 1879. This application was referred to the full Court which

Held, that the time for bringing the appeal in this cause under s. 25 of the Supreme Court Act began to run from Nov. 14, 1884, date of entry of the judgment of the Court of Appeal.

That where any substantial matter remains to be determined before the judgment can be entered, the time for appealing runs from the entry of the judgment. Where nothing remains to be settled, as, for instance, in the case of the simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

In appeals from the Province of Quebec, the time for appealing runs in every case from the pronouncing of the judgment, owing to the form of procedure in that Province.—Application allowed.—*O'Sullivan v. Harty*.

Dominion Elections Act, 1874.—Wager by Agent with voter — Corrupt practices.—The charge upon which this appeal was decided was known as the Pringle-Parker case.—Pringle, the President of the Conservative Association, made a bet of \$5 with one Parker, a Liberal, that he would vote against the Conservative party, and deposited with a stakeholder the \$5, which after the election were paid over to Parker.

At the trial Pringle denied that he was actuated by any intention to influence the conduct of the voter, and Parker said he had formed the resolution not to vote before he made his bet; but the evidence showed that he did not think lightly of the sum which he was to receive in the event of his not voting, his answer to one question put to him being: "Oh! I don't know that \$5 would be an insult to any person not to vote."

Held, reversing the judgment of the Court below, that the bet in question was colorable bribery within the enactments of sub-sect. 1 of sect. 92 of the Dominion Elections Act, 1874, and a corrupt practice which voided the election.—*West Northumberland Election Case*.

RECENT DECISIONS IN ONTARIO.*

Incorporated Company—Directors of Company—Stockholders.—B., one of the defendants, a director of the defendant company, personally owned a vessel "The United Empire," valued by him at \$150,000; and was possessed of the majority of the shares of the Company, some of which he assigned

to others of the defendants in such numbers as qualified them for the position of directors of the Company, the duties of which they discharged. Upon a proposed sale and purchase by the Company of the vessel "The United Empire" the board of directors, including B., adopted a resolution approving of the purchase of the vessel by the Company; and subsequently, at a general meeting of the shareholders, including those to whom B. had transferred portions of the stock, a like resolution was passed, the plaintiff alone dissenting.

Held, reversing the judgment of the Court below (6 O. R. 300), that although the purchase on the resolution of the directors alone might have been avoided, the resolution of the shareholders validated the transaction, and that there is not any principle of equity to prevent B. in such a case from exercising his rights as a shareholder as fully as other members of the Company.—Court of Appeal. *Beatty v. North West Transportation Co.*

Sale by sample.—The defendants bought by sample from W., who acted as a broker between them and the plaintiff, a quantity of cotton droppings or waste, to be delivered f.o.b. at St. Catharines, and by the directions of the defendants the same were forwarded to their branch house at Cincinnati, where it was alleged they were found to be not equal to the sample. In the meantime, however, the defendants had accepted a bill drawn on them by the plaintiff for the price of the waste.

Held, affirming the judgment below, that the proper place to have inspected the goods was at St. Catharines, and that even if the goods were not up to sample, it formed no ground of defence to the action on the bill. Court of Appeal.—*Towers v. Dominion Iron Co.*

Railway Act, 1879 — Express Company — 'Facilities.'—In an action by an express company against a railway company to compel the defendants to afford the plaintiffs the same 'facilities' that they did to another express company, alleging that the right to employ the station agents of the railway company as agents of the express company was such a 'facility,' and had been refused

to the plaintiffs, although granted to the other express company,

Held, that such right was a 'facility,' and that the Canada Railway Act of 1879, s. 60, ss. 3, provides any facilities granted to one incorporated express company shall be granted to others.

Held, also, that the plaintiffs could not compel the defendants to give the use of their agents, but if the defendants allow the agents to act for one company, it is a 'facility' that cannot be denied to the other company. (The action was, however, dismissed on the ground that the other express company had not been made a party, but without costs.)
Chancery Division.—*Vickers Express Co. v. Canadian Pacific Railway Co.*

COURT OF QUEEN'S BENCH.

[Crown Side.]

MONTREAL, June 16-17, 1885.

Before DORION, C.J.

REGINA V. EDWARD HOLLIS.

Abduction—Evidence—Interference with witness on way to Court—Taking out of possession of guardian.

HELD.—1. On a trial for taking an unmarried girl under the age of sixteen out of the possession of her guardian, that evidence of cruel treatment of the girl by the guardian is inadmissible.

2. That interference with a witness on the way to Court to give evidence, in order to prevent the evidence of such witness being given, is a contempt of Court.

3. That secondary evidence of the age of the child abducted may be permitted to go to the jury.

4. That where a child was taken, from motives of benevolence, from a barn where she had sought refuge, the barn not being on the property or premises of the guardian, and was then placed by the persons who had come to her relief in the charge of defendant as secretary of a society for the protection of women and children, the secretary was not guilty of taking out of the possession of the guardian.

The defendant, who is the Secretary of a Society for the Protection of Women and Children, was charged with unlawfully taking Henrietta Elliott, an unmarried girl under

sixteen years, out of the possession and against the will of Mrs. Duffy, the person having the lawful care and charge of her.

Mrs. Duffy, who was the first witness, testified that the child, Henrietta Elliott, was 15 years of age on the third of September last, had been given in charge of witness by her grand-father and uncle, and on the 23rd May last disappeared. In June saw Mr. Hollis, who said he did not know where the child was, but that he could find out. The child was a very bad girl, used to steal money and get drunk.

Cross-examined, she denied that she had ill-used the child. Had chastised her often but not severely. On the day she left, witness had accused her of stealing 20 cents. She was questioned concerning several specific acts of cruelty to the child, and denied them emphatically.

Charles Foster, grand-uncle of the child, was the next witness. When in England he had told the father and the mother of the child that he had promised *Mrs. Duffy* to bring her out a child. The father, pointing to Henrietta, said to witness, "You may take her that one."

William Duffy had been married for three years. His wife, formerly *Mrs. Redman*, had the child before her second marriage.

Mrs. Brennan deposed that last June, in Mr. Carsley's store, she had overheard the defendant say to Mr. Carsley, "We have got her at last," or words to that effect, but no names were used. She, however, concluded that reference was made to the case of Henrietta Elliott, for she had heard of her disappearance.

This closed the case for the Crown.

For the defence:—

Susan Wells, wife of Solon Morrison, was called. She had lived in Côte St. Paul, next door to *Mrs. Duffy*. On Friday, the 28rd of May, 1884, while at dinner, she saw the child Henrietta jump over her fence, and as she had heard that *Mrs. Duffy* sent her child to listen, she told her daughter to send her away. The child could not be found, however. But on Saturday afternoon, witness' daughter came into the house crying, saying, "I've found Etta and I think she's going to die." The child had been more than twenty-four

hours concealed in witness' barn, whither she had fled and had no food. Witness gave her half-a-loaf and about three pints of milk which she devoured. In the evening she was taken to the house of Mr. Higgins, who was a magistrate, as the child begged to be protected from the Duffys. The child had scars and bumps on her head, and her hair was matted with blood where there was a wound not then healed. Witness often heard the child screaming.

Mrs. Madden said she was a neighbour, and had regularly supplied the child Etta with food. Proceeding to narrate acts of cruelty she had witnessed, the Crown objected.

R. C. Smith, for the defendant, contended that evidence of the cruelty the child had been subjected to, if it could not be offered in justification, was relevant to the question whether the child's leaving Mrs. Duffy's house was voluntary or not, which was distinctly in issue.

C. P. Davidson, Q.C., contra.

The CHIEF JUSTICE disallowed evidence of cruelty to the child.

Joseph John Higgins said Mr. and Mrs. Morrison had brought the child to him, and he had come twice to town to see Mr. Hollis as Secretary of the Society, to ask him to do something for her. On Sunday evening Mr. Hollis drove out after church and took the child to town. Early on Monday morning Mr. Hollis and witness went to see Mr. Desnoyers, the Police Magistrate, and stated all the facts to him. Mr. Desnoyers requested them to bring the child down to him, which they did, and his Honor said he thought, after seeing the marks of violence on the child and hearing her story, that Mr. Hollis should take her to some safe place pending an enquiry as to her legal guardians.

At this stage of the case *Mr. Smith*, addressing the Court, said he had just been informed that while one Sanders, a young man, was bringing the girl, Henrietta Elliott, to the Court House, for the purpose of giving her evidence, he, Sanders, was waylaid by Mr. Duffy and another person. Mr. Duffy had assaulted him by striking him in the face, and had then seized the girl and dragged her into a cab and driven off with her. This fact, he submitted, constituted a contempt of Court.

Sanders being examined as to the facts, the Chief Justice said if an affidavit was offered that the witness, Henrietta Elliott, was essential, he would, if necessary, adjourn the case to give time to procure her. The affidavit was produced.

Mr. Smith called Mr. Duffy and asked him when he had seen the girl last. He replied, "About half an hour ago." The witness further stated that he had taken the girl away from Sanders and given her to a man whom he had never seen before.

The CHIEF JUSTICE, addressing Duffy, said he would allow him one hour in which to produce the girl in the court room.

Mr. Smith, pending the search for the child, argued that there was in law no case made out under the statute. There was no legal proof of the age of the child, the guardianship had not been sufficiently proven, and there was absolutely no evidence at all of any "taking out of the possession" of the guardian.

Mr. Davidson replied, and the Court directed that a rule for contempt of Court should issue against Duffy to show cause why he should not be sent to gaol. The rule was made returnable at ten o'clock in the morning.

On the following morning the girl, Henrietta Elliott, was present in Court.

As soon as His Honor had taken his seat on the bench Wm. Duffy was called.

The Court (addressing Duffy)—What have you to say regarding the rule which was issued by the Court yesterday?

Mr. Duffy—I did not know I was doing wrong in controlling the actions of the girl in my charge.

The Court—You have been guilty of a grave offence in apprehending this witness when she was required to appear in Court. You knew the child's whereabouts, as has been proved by her appearance here this morning under your charge. You are liable to a severe penalty as a warning to others against tampering with witnesses, but as the Court is not satisfied that you were guilty of wilful contempt, you are only adjudged to pay the costs which were incurred in the issue of this rule, and a further fine of five dollars.

HIS HONOR, giving judgment upon the objections of law, said, three objections had been raised, first, that there was no legal proof of the age of the child. He had intimated yesterday that he was inclined to let the evidence, such as it was, go to the jury. It had been argued that what the mother or father told any one was merely secondary and hearsay evidence. After further consideration he was still of opinion that it should go to jury, though the evidence was certainly very unsatisfactory on this point. As to the second point raised, that the guardianship had not been proved, His Honor thought the evidence had established a sufficient guardianship to bring it under the statute. The third point was that there was no evidence of any facts constituting in law a taking of the child out of the possession of her guardian. Mr. Hollis, as secretary of the Society for the Protection of Women and Children, had brought the child from the house of Mr. Higgins in Côte St. Paul to Montreal. Here he might remark that this Society had no more rights than an individual, and no matter how philanthropic and benevolent its object might be, it had to carry out that object by the means which the law furnished. So that it would be no excuse or justification for Mr. Hollis' act that he acted as Secretary of this Society. But what the evidence showed was that the child had of her own accord left Mrs. Duffy's house and had been found in the hayloft or barn of Mr. Morrison, a neighbour, in a starving condition, protesting that she would not return to Mrs. Duffy. It would have been simply inhuman for Mr. Morrison to turn the child out. He did what was right and benevolent, gave the child some food. The child was taken to Mr. Higgins' house, and he had done no more than a benevolent man ought to have done. She had remained more than twenty-four hours in Morrison's barn and more than twenty-four hours in Mr. Higgins' before Mr. Hollis saw her at all. As to the evidence of ill-treatment, it had been excluded as having nothing to do with the case. On the day following the taking of the child to town, Mr. Hollis had shown his absolute good faith by taking the child before the Police Magistrate. On the whole, His Honor was of opinion that there was no

evidence to give the jury of any taking out of the possession, and therefore on the third point raised would direct the jury to acquit the accused.

Owing to the absence of one of the jurors a new jury was sworn in, and under the direction of the Court returned a verdict of "not guilty," and Mr. Hollis was discharged.

Mr. Davidson produced a letter from the child's mother urging that she should be returned to England, as she was now well able to take care of her.

The CHIEF JUSTICE said that he had no jurisdiction to make any order in the case, but that he would hear what the child herself had to say.

The child came forward and said she was between sixteen and seventeen years old now, and that she wanted to go to her mother in England.

The CHIEF JUSTICE said that all he could do was to advise the child to return home to her mother with her uncle, Mr. Foster, and the case thus terminated.

C. P. Davidson, Q. C., and E. Guerin for the prosecution.

R. C. Smith for the defence.

LONDON LETTER.

The uncertainty which has pervaded political circles during the last few weeks has partly communicated itself to the halls of justice, where for many days it was absolute mystery to whom the Queen would entrust her conscience, or who would fill the vacant posts of Attorney and Solicitor General. It was by many, indeed, supposed that the capacious form of Sir William Brett, Master of the Rolls, would occupy the woolsack and marble chair, and his great legal abilities would certainly have been some pledge of his efficiency in that high station, but the elevation of Sir Hardinge Giffard to the post of Chancellor has, on the whole, given satisfaction to the profession and to the public. His appointment, indeed, marks a kind of deviation; for Lord Halsbury, unlike his predecessors, Lord Selbourne, Lord Cairns and Lord Hatherley, has chiefly practised the common law, and his squat figure and genial manners are still very vividly remembered at the old Bailey. As an advocate he had few equals; never was

there a happier combination of the *suaviter in modo* with the *fortiter in re*; and often when he seemed to make a damaging admission he won by his frankness and candour. Of Mr. Webster, the new Attorney General, everybody is glad to speak with praise for his unfailing courtesy and generosity, and his learning and accomplishments. The nomination of Mr. Gorst as solicitor general is, in some respects, unpopular at the bar, because he has for many years given himself wholly to politics; but it will be remarkable in the colonies inasmuch as he held some years ago a responsible post in one of the Australian dependencies.

Another circumstance that will, doubtless, be of interest in the distant parts of the empire, is the elevation of Sir Arthur Hobhouse to the House of Lords. This distinguished man, who is a Barrister of Lincoln's Inn, served many years in India, and since his return has regularly sat as one of the Judicial Committee of the Privy Council.

In speaking of the House of Lords I am reminded of the unusual number of peerages that have lately been called in question. Within a month the honours of Lauderdale, of Lovat and of Aylesford have been contested; of which the second is like a chapter of romance, the last has been already before the public by means of the Divorce Court, and the first is like an ordinary Scottish pedigree inquiry,—long, intricate, and doubtful.

The case of Mr. Louis de Souza, of Lincoln's Inn, was this morning before the Judicial Committee of the Privy Council. This learned gentleman, as your readers are aware, had claimed to be heard as of counsel in Ontario; but the Court of Appeal refused to try his right, refused to record their decision, and ordered the sheriff to turn him out.

Mr. de Souza now appeared in support of his petition to the Queen in Council for special leave to appeal; but the Judicial Committee thought that the case of *Mr. D'Alain* (11 Moo. P. C. 64) was not a precedent for their interference. Mr. de Souza has only this consolation, that he defeated the Law Society of Ontario on the question of their power to exclude him altogether from practice, as they had assumed to do by an ordinance of 1882.

Lincoln's Inn, 4th July, 1885.

GENERAL NOTES.

Governor Rusk, of Wisconsin, recently vetoed a bill providing for the sentence of vagrants for ninety days and confining them to a bread-and-water diet. The governor holds that imprisonment for that period on the diet prescribed would be "cruel and unusual, and thereby violates the constitutional provision which forbids the infliction of cruel and unusual punishment."

An old lawyer in Paris had instructed a very young client of his to weep every time he struck the desk with his hand. Unfortunately the barrister forgot himself and struck the desk at the wrong moment. The client fell to sobbing and crying, "What is the matter with you?" asked the presiding judge. "Well, he told me to cry as often as he struck the table." Here was a nice predicament: but the astute lawyer was equal to the occasion. Addressing the jury he said: "Well, gentlemen, let me ask you how you can reconcile the idea of crime in conjunction with such candor and simplicity? I await your verdict with the most perfect confidence."—*Criminal Law Magazine*.

J. R. Porter, of the State of New York, now famous for his brilliant attainments, when a young man, was assigned by the Court the defence of a man charged with assault in the second degree, to give the accused the best advice he could under the circumstances, and to bring the case to a trial with all convenient speed. Porter immediately retired to an adjacent room to consult with his client, and returned shortly without him. "Where is your client?" demanded the judge, "He has left the place," replied Porter. "What do you mean, Mr. Porter?" "Why your Honor directed me to give him the best advice I could under the circumstances. He told me he was guilty, so I advised him to run for it. He took my advice, as a client ought, opened the window and skeddaddled. He is about a mile away now." The audacity of the young barrister deprived the court of the power of speech, and nothing came of the matter.—*Criminal Law Magazine*.

Bankers and business men generally have suffered considerable inconvenience by the delayed payment of drafts and orders presented for payment after the death of the drawer. The Legislature of Massachusetts has just passed a law, by which savings banks can pay for thirty days after the date of the order, and later, if no actual notice of the drawer's demise has been received, and national banks, trust, safe deposits and all other depositories are allowed to pay out for ten days after the drawer's death. This law applies to single-name checks, of course. Henceforth, therefore, the only thing to be considered in taking and depositing such single checks is the drawer's financial standing and character. Hitherto the taker had reason to be afraid that the drawer might die before payment, and if known to the payee, the holder would have to wait one or two years until the estate could be settled, and it might then be proved to be insolvent. Hence a man alone in business had not the same facilities (at least so far as giving out checks in the settlement of accounts) as he who had a partner. The amendment of the law just enacted was certainly called for, and business men will be glad to know that it has been made.—*Boston Traveller*.

The Legal News.

VOL. VIII. JULY 25, 1885. No. 30.

The judgment of the Court of Queen's Bench, Montreal, in the case of *Abbott & McGibbon* (7 L. N. 179) has been affirmed by the Privy Council, and the appeal dismissed. The question was, where a testator had power of apportionment of an estate between his children, and in the division one child was wholly excluded, whether there had been a valid distribution. The Court of Appeal in Montreal held that a division among four of the children to the exclusion of the fifth, was a valid exercise of the power vested in the testator. The Privy Council has dismissed the appeal from this decision.

University education as a preliminary to legal studies has been cried down recently in some quarters where the veneering of civilization is hardly skin deep, and where a University man would probably be very much out of his element. In an old forensic arena like London this is very far from being the case, and the record as far as regards the new legal appointments is surprisingly strong on the side of the old Universities, and particularly Cambridge. A contemporary states that both the law officers were 'wranglers,' Mr. Webster in 1865 and Mr. Gorst third wrangler in 1857. Five out of the ten new Queen's Counsel were at Cambridge, and of these Mr. Moulton was senior wrangler and Mr. Kennedy senior classic in the same year—that is 1868. Mr. Bayford and Mr. Channell were also wranglers, and Sir Arthur Watson is a Cambridge man. Oxford is represented by Mr. Elton, who was Vinerian scholar in 1862, and Mr. Samuel Taylor.

In a lecture delivered a short time ago in England the question was raised whether the Post Office could not supply official proof of the posting of letters where such proof might be desired. In English courts, it seems, very vague evidence is often accepted, and

registration is not insisted upon. The suggestion is that forms should be issued at about three pence a dozen, to be filled up with particulars of the address of the sender of the letter, and simply examined, stamped and returned at the receiving office. A process so simple as this could be carried out at a very trifling cost to the department and might probably—as has already been proved with other small conveniences of a similar kind—be converted into a profitable source of revenue.

COURT OF QUEEN'S BENCH— MONTREAL.*

Master and servant—Responsibility of employer—Negligence of servant—Injury to fellow-servant—C.C. 1053, 1054.—An employer is liable for any want of care on his part by which his servant is injured; and, therefore, if he engages an unskilled or careless person to conduct his work, and owing to the want of skill or care of the person so employed, another workman is injured, the employer is responsible. But in order to hold the employer responsible, it must be clearly established that the negligence or want of skill of the fellow workman caused the accident by which the damage was occasioned. So, where two workmen were engaged in an operation not shown to be hazardous, and an explosion occurred which killed the superior workman and injured the plaintiff who was assisting the other, it was held that the workman injured had no right of compensation from the employer, in the absence of any evidence as to the cause of the accident, or that the employer was in fault by having hired a careless or unskillful workman.—*The St. Lawrence Sugar Refining Co., appellant, and Campbell, respondent.*

Municipalités de villages—Municipalités locales—Code Municipal, art. 19, § 3, et art. 27—Pavage—Empierrement des chemins—33 Vic., c. 32—36 Vic., c. 26, s. 34.—JUGÉ:—1o. Qu'aux termes du Code Municipal (34 Vic., c. 68, art. 19, § 3) les "municipalités locales" comprennent les municipalités de villages.

*To appear in Montreal Law Reports, 1 Q. B.

20. Que l'article 27 du même code ne fait qu'indiquer quelles municipalités rurales seront considérées comme municipalités locales sans égard aux municipalités de villages, qui tombent sous la règle générale établie par l'art. 19, § 3.

30. Que par conséquent une compagnie dûment incorporée en vertu de l'acte 33 Vict., c. 32, avait le droit d'empierrer un chemin de front dans les limites d'une municipalité de village, d'y poser des barrières et d'y percevoir des péages.

40. Qu'en vertu du dit acte une telle compagnie a le droit d'exiger un péage pour une fraction de mille parcourue, pourvu que sur toute la longueur du chemin parcouru le taux n'exède pas le montant par mille fixé par la cédule B du dit statut.—*La Compagnie du Chemin de Péage de la Pointe-Claire*, appelante, et *Leclerc*, intimé.

*Privilege of the Crown—Deposit in Bank—C. C. P. 611.—Held:—*1. (Following *Mont & Attorney-General*, 19 L. C. J. 71), that the privilege of the (Crown for its claims over those of private competing creditors is to be governed by the civil law of the province of Quebec derived from France and not by the law of England.

3. That under C. C. P. 611, in the absence of any special privilege, the Crown has a preference over chirographic creditors for deposits due to it by a bank in liquidation.

3. The holders of notes of an insolvent bank, being accorded a special privilege by statute (43 Vict., c. 22, s. 12), take precedence of the Crown.—*The Queen*, appellant, and *The Exchange Bank of Canada*, respondent.

COUR DE CIRCUIT.

MONTREAL, 27 juin 1885.

Coram LORANGER, J.

LECOMTE v. COTRET.

Pigeons—Propriété par voie d'accession.

JUGÉ: 10. Que les pigeons qui passent dans le colombier d'un voisin, sans fraude ni artifice de sa part, deviennent sa propriété par droit d'accession.

20. Que d'après les dispositions de l'art. 428 du C. C., nous ne reconnaissons qu'une seule espèce de pigeons.

Le demandeur alléguait par sa déclaration, qu'au mois de mars dernier, le défendeur avait attrapé, par fraude et artifice, un pigeon lui appartenant et qu'il retenait contre son gré.

Que ce pigeon était de l'espèce connue sous le nom de "pouter" et valait au moins \$4. Et il concluait à ce que le défendeur fut condamné à lui payer cette somme.

Le défendeur, par sa contestation, a nié tous les faits et allégué spécialement :

Qu'il ignorait que le pigeon du demandeur fût passé dans son colombier, et que si tel était le cas, le dit pigeon était devenu sa propriété par droit d'accession, et que le demandeur n'avait pas le droit d'en réclamer le prix. Qu'il était spécialement faux qu'il eût employé aucun moyen frauduleux ni aucun artifice pour attirer ce pigeon. Et il concluait au renvoi de l'action.

A l'enquête le demandeur prouva que son pigeon était passé dans le colombier du défendeur et qu'il valait la somme d'au moins \$4. Mais il ne fut prouvé aucune fraude ni aucun artifice de la part du défendeur, pour attirer le dit pigeon.

A l'appui de ses prétentions, le demandeur a cité les autorités suivantes :

1 Pothier, page 201.

9 Ibid, p. 156, No. 166.

2 Aubry et Rau, pp. 15 et 248.

2 Marcadé, p. 422.

De son côté, le défendeur a cité :

4 Pothier, Traité de la Propriété, No. 166.

6 Laurent, Droits Réels, Nos. 310 et 311.

4 Merlin, Répertoire, au mot colombier, p. 469, col. 2, 3e al.

10 Demolombe, Nos. 176 à 181.

Au No. 179, Demolombe s'exprime comme suit :—"Mais au contraire, lorsque l'émigration des pigeons d'un colombier, dans un autre colombier, a été volontaire ; lorsqu'elle n'a été provoquée par aucun artifice, nous pensons qu'il n'y a lieu à aucune action ni en revendication, ni en indemnité, *lors même que l'identité des déserteurs serait reconnaissable, comme s'ils étaient, par exemple, d'une autre espèce que les pigeons du colombier où ils ont été s'établir.*"

C. C. B. C., art. 428.

PER CURIAM. Il est évident d'après les termes de la loi et la preuve offerte, que le dé-

fendeur est devenu, par voie d'accession, propriétaire et possesseur incommutable du pigeon en question qui est passé dans son colombier, sans fraude ni artifice de sa part.

Comme l'art. 428 du Code, ne reconnaît qu'une seule espèce de pigeons, sans toutefois la définir ou la désigner autrement que par le mot "pigeons," je ne puis créer en faveur du demandeur une exception à laquelle la loi n'a pas pourvue; et en présence d'un texte aussi formel que celui de l'art. 428, je ne puis maintenir l'action du demandeur et la renvoie avec dépens (1).

Action renvoyée.

St. Jean & Leblanc, procureurs du demandeur

Augé & Lafortune, procureurs du demandeur.

(J. G. D.)

JURISPRUDENCE FRANÇAISE.

Interdiction—Conseil de famille—Composition—Enfants des demandeurs en interdiction.

Les enfants du demandeur en interdiction peuvent être régulièrement appelés à faire partie du conseil de famille, qui doit donner son avis sur l'état de la personne dont l'interdiction est demandée.

On ne saurait notamment demander leur exclusion de ce conseil par application de l'art. 442, § 4, C. Civ., la demande en interdiction elle-même ne pouvant être considérée comme créant entre l'auteur de cette demande et la personne qui y défend, un procès dans lequel l'état de cette dernière ou sa fortune seraient compromis, dans le sens de la disposition légale précitée.

(19 mai 1885. *Cass. Gaz. Pal. 6 juin 1885*).

(1) Il ne faudrait pas même considérer, dit Demolombe, vol. 10, p. 142, 1er al., comme un artifice frauduleux le fait d'un propriétaire de pratiquer dans la clôture de son parc, des trappes mobiles afin de faciliter l'entrée du gibier provenant des propriétés contiguës, lors même que ces trappes seraient disposées de manière que le gibier ne puisse plus sortir. Et il appuie cette opinion sur un arrêt de la cour de cassation du 22 juillet 1861, qui se lit comme suit :

"Attendu que la faute seule engage la responsabilité de son auteur et que nul n'est tenu de réparer le dommage causé par l'exercice légitime d'un droit;

"Attendu que les trappes dont se plaignent les demandeurs sont établies sur la clôture du défendeur, et sur sa propriété;

"Attendu que le gibier auquel elles donnent accès dans son bois, n'appartient encore à personne; qu'il y a eu en toute liberté, sans qu'aucun moyen ait été employé pour l'attraper. . . . (Note du rapporteur).

Testament authentique—Dictée—Copie sur un modèle. Doit être déclaré nul par application de l'art. 872 du Code Civil le testament authentique que le notaire a purement et simplement copié sur un modèle de testament, antérieurement préparé, au lieu de l'écrire sous la dictée du testateur.

(*Cour d'Appel de Caen*, 17 nov. 1884. *Gaz. Pal.* 14-15 juin 1885).

TRIBUNAL D'ANGOULÊME (FRANCE).

Mai 1885.

Définition du mot clôture—Clôture légale d'un terrain.

Le sieur T. avait été arrêté pour délit de chasse, en temps prohibé, sur un terrain non clos. L'accusé plaidait que le terrain était clos.

Voici les remarques du tribunal sur ce qu'il faut entendre par "terrain clos" et le mot "clôture :

"La loi n'a point défini le sens absolu qu'elle attachait au mot clôture. On peut dire d'une manière générale, qu'il y aura clôture, toutes les fois que certains objets manifesteront clairement l'intention de la part du propriétaire d'empêcher de passer sur son fonds et qu'ils constituent en même temps un obstacle réel et effectif au passage. Il suffit que la clôture oppose un obstacle sérieux et de nature à arrêter une personne d'une force, d'une agilité et d'une taille ordinaire n'ayant pas recours à des moyens de locomotion exceptionnels et inusités. Quand les conditions ci-dessus sont remplies, il y a lieu d'examiner si ce terrain est attenant à une maison habitée.

"Spécialement il y a clôture dans le sens de l'article 2 de la loi du 3 mai 1844, si le terrain attenant à une maison habitée confronte d'un côté à la voie ferrée, dont il est séparé par un treillage à la suite duquel est un talus élevé et à pente très rapide, d'un autre côté à une rivière non navigable ni flottable et entouré dans ses autres parties d'un fossé de deux mètres de largeur sur cinquante centimètres de profondeur, presque entièrement rempli d'eau."

Le tribunal prononça l'acquiescement.

(Rapport de M^{re}. Louis Albert au *Journal de Paris*).

(J. J. B.)

AN EARLY CRIMINAL TRIAL.

In the course of recent reading I came across an amusing and instructive account of a criminal trial occurring in England about six hundred years ago (say A. D. 1302), and but a few years, comparatively, after the enactment of Magna Charta. It not only illustrates the manners and customs of the time, but sheds light on the mode of making use of "benefit of clergy," of "trial by one's peers," of challenging jury-men, of refusing counsel to prisoners on trial for felony, and of judicial protection and countenance to an abashed prisoner, which are in some respects the glory, and in others the shame of English criminal law.

The account of the trial is in Latin, and I have ventured to give a free translation of it. The reporter of the case performs a peculiar function in making side remarks as he goes along, by way of criticism and suggestion. I shall follow his practice, and, in passing, throw in some modern explanations.

Curiously enough, though the account of the trial is perfectly authentic (being found in ancient English court papers), neither the name of the judge, nor of the prisoner, nor of the reporter is ascertainable. Nothing is known of the prisoner except that he is "Sir Hugh," and was a knight, presumably of "gentle blood." For convenience sake, the various actors will bear assumed names, taken from the same old papers, also illustrative of the times. The prisoner will appear as Sir Hugh Bad; the judge as "his honor, Judge Tynterel;" and the reporter as "Adam Worry." Sir Hugh had a serviceable friend, whose name was "Leyr," a personage useful in court matters even in our own day.

The case opens with a presentment by "the twelve of Y," (apparently acting as a grand jury), to the effect that Sir Hugh had committed the offence of rape, with the usual legal statements and descriptions of the offence. He was thereupon brought to the bar (*ad barram*) by two persons, perhaps his bail. Tynterel thereupon said to one of them, named Brian: "I understand that this man is your relative; you may stand by him and give him your countenance, but you must not advise him." Brian replied: "That

is true, he is my relative; but, that I may not be suspected of having anything to do with the controversy, I will take my leave." And so this very prudent and circumspect relative departed. Then Tynterel said to the prisoner, "Sir Hugh, there is a presentment against you, that you have committed the crime of rape, etc.; how do you propose to defend yourself?" Then Sir Hugh: "Your honor, I ask for counsel. Give me counsel, that I may not be tripped up in the king's court for want of counsel." Then said Tynterel, "You ought to know that the king is a party in this case, and prosecutes you *ex officio*, and in such a case the law does not permit you to have counsel against the king—indeed, if the woman had been prosecuting you, you should have had counsel against her, but not against the king. Accordingly I now order, in behalf of the king, that all the pleaders who are here in order to be of your counsel, shall depart." Mr. Worry then interposes that all the counsel are removed.

Tynterel resumes: "Hugh, respond; the deed charged against you is possible, it is your own deed, and you can respond very well without counsel, whether you committed it or not. The law is common to all, and must be uniformly administered, and the law is, that when the king is a party *ex officio*, you shall not have counsel against him." He then proceeds to make this remarkable statement, which he must apparently have done in a manner not audible to the bystanders, while he was certainly heard by the inquisitive Mr. Worry. "If I, in opposition to the law, should give you counsel, and the 'country' (meaning the jury) should be with you, as, please God, they may, then the common talk would be that you had been set free by the favor of the justice. So I do not dare to award you counsel, and you ought not to ask it; so answer." Sir Hugh said no more about counsel.

This absurd and barbarous rule, denying a prisoner, charged with a felonious crime, the privilege of stating his case by counsel, rooted in the very outset in the system of trial by jury, continued unchanged in England, except in cases of high treason, down to the memory of men now living. There was a

preposterous idea prevailing that the judge should be, as it were, counsel for the prisoner. The rule applied to all; to the ignorant, the deaf, the young. Nothing, however, could shake the rule, until it met with the terrible and scathing invectives of Sydney Smith, in the *Edinburgh Review*, in 1826, where he maintained at length the proposition, set forth with *italics*, that a prisoner once accused of felony ought to have the same power of selecting counsel to speak for him as he has in cases of treason and misdemeanor, and as defendants have in all civil actions. This almost seems incredible.

Counsel were allowed for the first time by 6 and 7, William IV. c. 114 (1836-7).

It is very noticeable that the justice in the present case feared to allow counsel, because of the public opinion of the time. The people demanded an impartial administration of the laws against knights and nobles as well as common men. The judge did not *dare* to face the opinion. A sound public opinion was then as now a healthy check upon the administration of criminal justice.

Sir Hugh next takes up his defence, and instead of pleading not guilty, he pleads in opposition to the jurisdiction of the court. He played the following card. He said, "Your Honor, I am a clergyman, and I ought not to be called on to respond without my 'ordinary' " (meaning the bishop or ecclesiastical superior). Then said the judge, apparently astonished, "Are you truly a clergyman?" Whereupon Sir Hugh replied, "It is true; I have been a rector of the church of N." Then the bishop appeared in court, and said to the judge, "I demand him as a clergyman." Whereupon Sir Hugh cried, exultingly, "You hear what he says." But said the judge, "I say that you have lost the 'benefit of clergy,' because you are 'bigamous,' that is, you married a widow, and you must answer, whether when you married your wife she was a virgin or not, and you may as well tell the truth at once as to seek any evasion, for I shall immediately submit the matter to the country" (the jury). We may hope that Sir Hugh, being a knight, was a man of truthful disposition, but he was on trial for a vile crime, and, if convicted, subject to a terrible punishment, involv-

ing personal mutilation. So he put a bold face upon the matter, and said, without the quiver of a muscle, "My wife was a virgin when I espoused her." Then said Tynterel, "I must find out the truth of this matter, right away." So the reporter says he asked "*the twelve*," and they declared upon their oath that she was a widow when Sir Hugh married her. Mr. Worry thereupon remarks that it was a noteworthy thing that Tynterel did not administer a cumulative oath to the jury for this purpose. Then the court said, "You must respond not as a clergyman but as a layman, and you must submit yourself to these twelve 'honest men,' who are unwilling to lie for the king.

This is certainly a very graphic description of the way in which even a man of military rank would strive to pass himself off as a clergyman, in order that he might escape the dreadful severities of a criminal trial and punishment in the king's court. Had Sir Hugh been successful in his plea to the jurisdiction of the court, he would have been handed over to the bishop who claimed him. His trial before him would have been a farce. At most, if convicted, he would have been sentenced to be branded in the hand, and the sentence would very likely have been carried out with a *cold iron*. This it was to have "benefit of clergy," and this existed down to the time of the American revolution, when a new plan of punishment by imprisonment and transportation to a penal settlement took the place of the former barbarous methods (applicable to the laity), while unmeaning privileges were swept away, and the same rules of punishment were applied to all, without distinction of clergy and laity. When the case now in hand was tried, the distinction between the two classes was a real one; before it was abolished it was merely a line drawn between those who could read and those who could not. The case seems to show that a clergyman then could be married, except to a widow, but whether this was canon law or only Tynterel's law may be open to discussion.

Sir Hugh, baffled in his plea of being a clergyman, tries another plan. He objects to the jury, who are ready in court to try the

case. He makes two points: one is that he is *accused* by them, and that accordingly he will not consent to be *tried* by them. The meaning of this would seem to be that the *same men* are assuming to act both as a grand jury and a petty jury. Then, observing that they are men of inferior rank, perhaps yeomen or farmers, he says, "Your honor, I am a knight, and will not be judged except by my peers" (*pares*). To this Tynterel replies, "Since you are a knight, I direct that you be tried by your peers." So knights are summoned to try the case. Then Tynterel says further to Sir Hugh, "Do you desire to propose any challenges in respect to them?" Sir Hugh replies, "I do not agree to them; you may take whatever inquisition you desire *ex officio*, but I will not agree to them." To this Tynterel responds, "If you will consent to them, with the help of God they will act in your case; but if you will not, and refuse to follow the rules of the common law, you will suffer the regularly-ordained punishment, viz., one day you will be allowed to eat, and the next day to drink; but the day that you eat you shall not drink, and *vice versa*. When you eat you shall have barley bread without salt, and the day you drink, water," etc. Mr. Worry pauses at this point, and remarks that the judge said "many other things," showing why it would not be a good thing for him to adhere to his refusal, and why it would be better to consent. Sir Hugh took the hint, and said, "I will consent to be tried by my peers, but not by these twelve by whom I am accused. Be kind enough to have my challenges read." To this the judge said, "Gladly; let them be read, or if you can state any ground why the twelve should be removed, proceed orally." Then Sir Hugh: "I *desire counsel*, for I cannot read." Tynterel responds: "No! for this affects our lord, the king." To this, Sir Hugh: "Then you may take the challenges and read them." Tynterel: "No! for they must come from your mouth." Sir Hugh: "I cannot read." Tynterel then wakes up, and says, "How is this, Sir Hugh? It is but a few minutes ago that you were claiming the 'benefit of clergy,' and you were even rector of a church, and now you say you cannot read! Oh, fie!"

At this point the good reporter Worry in-

terjects a remark to the effect that Sir Hugh stood silent, abashed and confused. Tynterel now tries to cheer him up, by saying: "Be not abashed; now, if ever, is the time to speak." Then the justice turns to Sir Hugh's friend, Leyr, saying, "Would you not like to read the challenges of Sir Hugh?" To which Leyr replies, "Yes, your Honor; if I only had the book which he holds in his hands." This was allowed. Then Leyr said, "Here are challenges against many of the jury. Do you wish that I should read them publicly?" Tynterel replies, "No! read them to the prisoner secretly, because they must be uttered by his mouth." And so it was done, and the challenges turning out to be true, all the disqualified jurymen were removed and others substituted. The jury being obtained, Tynterel said to them, "Sir Hugh is charged with the crime of rape. He pleads not guilty, and he is asked how he desires to be tried, and he says by the 'country' (*per bonam patriam*), so he places himself upon your decision for better or for worse. So we enjoin you to declare upon your oath whether Sir Hugh committed the offence with which he is charged or not." *The twelve* men say, "We declare that the woman was ravished by the 'men' of Sir Hugh." Then Tynterel: "Was Sir Hugh consenting to the crime?" *The twelve*: "No." Some other questions being asked and answered, which brought out the fact that there was no ravishment, the judge finally said, "Sir Hugh, because they (the twelve) acquit you, I acquit you."

This extraordinary trial is of the highest interest, as showing trial by jury in its earliest infancy. No authentic case dates back of this. There seems to be a mystery hanging about this form of trial, in the minds of the men of the time. The triers are "The twelve;" they are the "country," the "good country," "twelve honest men." They are but seldom called a jury. The case shows that the word "peers" in the great charter meant political equals, and that even a knight might demand a jury of knights. Further, there could be no trial of the facts unless the prisoner entered a plea of "not guilty." If he would not plead, he must be *made* to plead, by subjecting him to extreme

torture in regard to want of food and drink and in other respects, which the reporter refrained from disclosing. This was the "*peine forte et dure*" of later days when a prisoner who would not plead, in addition to a daily supply of a few morsels of loathsome food and a few draughts of the vilest water, was to sustain constantly upon his person as great a weight of iron as he could bear, *and more*, and this until he died, unless he sooner answered. This continued to be law until 1828, when, if a prisoner refused to plead, the humane practice of entering the plea of "not guilty" was adopted. The case further shows that the judges were inclined to administer the law as humanely as its rules would allow, and that a verdict of acquittal was deemed to be final. The system of challenging jurymen for unfitness, now so well established, was at that early day in existence, though with this singular qualification, that the challenges must come from the prisoner's own mouth, though they might be read to him to refresh his memory. There is in this trial a complete absence of formality. Question and answer pass between judge and prisoner, judge and jury, and judge and bystander in rapid succession. Subterfuges are speedily detected, and the kernel of the case soon reached. On the whole, the judges of the olden days set a good example to those of our time in regard for law, respect for an impartial public opinion, kindness to a prisoner on trial, grasp of questions involved, and due regard for the facts and verdicts of the mysterious "twelve" who then, as now, could in general be relied upon to bring a popular, and because popular, salutary element into the administration of criminal justice. Though the law was severe, and the punishments barbarous, nothing else could effectually quell the powerful ruffians who filled the neighborhood with terror, and dominated all things, except the king when in the field, or when meting out, through the medium of his judges, retributive justice in its most awe-inspiring forms.—THEODORE W. DWIGHT in the *Columbia Jurist*.

TRADE MARKS.

One of the most important changes made in the law relating to the registration of trade marks by the Patents, Designs and Trade Marks Act, 1883, (46 and 47 Vict. c. 57) was the extension of the definition of a trade mark so as to include "fancy words." Under the Trade Marks Registration Act, 1875) 38 & 39 Vict. c. 91), the definition of a registrable trade mark (Sec. 10) was purposely framed so as to include fancy words, except in the case of old marks, i.e., marks used before the passing of the act, in which case only "any special and distinctive word or words," were allowed to be registered. An attempt was indeed made in *Ex parte Stephens*, 3 Ch. Div. 659, to bring a newly invented word within the description of "device," but without success, and down to the coming into operation of the act of 1883, fancy words continued to be excluded from registration, except where they had been used before the act of 1875. The definition section of the act of 1883, however (Sec. 64), not only allows "any special and distinctive word or words" to be registered as an old mark, but specifies among the essential particulars the possession of one of which qualifies for registration irrespective of previous user, any distinctive "fancy word or words not in common use."

What was wanted by the trader who procured the recognition of fancy words as trade marks was the assimilation of the symbols registrable as new trade marks to the symbols registrable as old ones, and the assimilation generally of the trade marks recognized in this country with those generally recognized abroad, especially in America. The words "fancy word or words," being included in the section, it does not seem to have occurred to those concerned, that the addition of the words "not in common use" by the Board of Trade, might have the effect of raising a difficulty, and even of taking away with one hand what was given by the other. It seems to have been assumed that "not in common use," was equivalent to "not in common use as applied to the goods in respect of which they are registered;" so that the effect would be to make the registrability of words depend, not upon their novelty *in se*, but upon the novelty of the mode of application.

The Board of Trade, however, in the very recent case of *Re Stapley and Smith's Trade Mark "Alpine"* attempted to set up a distinction between words newly inserted and existing words used in a new application, which has never hitherto been recognized either in English or American law, and which, if established in England, would set up a new *differentia* between the law of trade marks in force here, and that in force elsewhere, and might be productive of considerable difficulties in connection with the registration in England of the trade marks of foreign owners. In support of the contention of the Board of Trade, reliance was placed on the words "not in common use" as showing that a registrable fancy word must be newly coined, but Mr. Justice Chitty fortunately found himself able to take the view that an existing word might constitute a "fancy word not in common use" if applied to an article with which it had no natural or established connection.

Newly coined words are especially open to the objection that they may easily come to be descriptive of a special article, and so cease to be distinctive, as "linoleum" was held to be descriptive: *Linoleum Manufacturing Company v. Navin*, 38 L. T. Rep., N. S. 448; 7 Ch. Div. 834; whereas such appellations as "Eureka" shirts, "Sefton" cloth, "Crown Seixo" wine, or "Dogshead" beer, are not nearly so much exposed to the same risk. On all grounds Mr. Justice Chitty's decision is on the side of the balance of convenience: if the point were determined the other way, it would be necessary for traders to endeavor to get the act amended. Although the decision in the "Alpine" case is so recent, there has already been time for it to receive support from Mr. Justice Pearson's ruling in the case of *Slazinger v. Mallings* in which he held that the words "The Lawford," which had been registered as a fancy name for lawn-tennis raquettes, were properly registered and capable of protection. We ought not to omit to mention that in the "Alpine" case Mr. Justice Chitty very properly ridiculed a contention by the Board of Trade that a word not distinctive in itself could be made so by prefixing "The" to it, so that according to their argument, "Alpine" would be a bad trade mark, but "The Alpine" a good one.

It seems difficult to conjecture who could have invented such a theory.—*Law Times* (London.)

GENERAL NOTES.

It is to be hoped that Prince Albert Victor before he has been long a member of an Inn of Court will be able to modify the rather gloomy view of the meaning of the words "in Chancery" which he has gathered as an apt student of 'Bleak House.' Writing of a drive through the wilds of Australia, the royal midshipmen say: 'In many places we drive as through an open English park, only it is a park in Chancery, with the trees fallen and dead and the stumps protruding here and there, and pools uncared for, and the grass growing by their sides, dark and lank.' 'In Chancery' in its opprobrious sense is, like 'drunk as a lord' and other phrases, a survival historically imbedded in the language, used perhaps so marking progress, but happily recording a fact sometime past and gone.—*Law Journal* (London.)

A case which is of much interest was tried at Ottawa on Thursday last before Judge Lyon with a jury, in which Mr. M. Pennington, of Montreal, was the plaintiff, and Mr. Octave Noel, of Ottawa, defendant. Mr. Noel, who is in business, had over his store a sign on which was written M. M. Noel. A traveller of Mr. Pennington sold the defendant two bills of goods, and at each time he called defendant was in the store, seeming to have complete management of same, and really to be proprietor of the business. He gave the orders with the initials "M. M. Noel." Enquiries were made by the plaintiff, who naturally supposed that "M. M. Noel" was the party who transacted the business with his traveller, and nothing could be learned to the contrary: accordingly he addressed all invoices and letters to "M. M. Noel, Esq., as a man, and no intimation, it was alleged, was ever given by the defendant to the plaintiff that he was mistaken in so addressing the correspondence. The defendant withdrew from store-keeping and went into contracting without the knowledge of the plaintiff, and when the bills became due said that he never was proprietor of the business, "M. M." being his wife's initials, that she alone had been owner, and to look to her for the money as he was not going to pay his wife's debts. She, of course, had nothing. Mr. Pennington then sued Octave Noel for the amount, believing that the business had belonged to him; that he had been guilty of sharp practice and deception, and that such sign over his door was misleading—"M. M." instead of "Mrs." or "Mary M. Noel." After the examination of several witnesses counsel for both parties reviewed the case at length. Mr. W. H. Barry, of Ottawa, the plaintiff's counsel, in his address to the jury, pointed out the danger of loss to which the mercantile community would be subjected if a man could with impunity go into business, get credit and act in such a manner as to make his creditors believe that it was his, and afterwards tell them to look to his wife for payment, as he was not responsible.

A verdict was returned in favor of the plaintiff for the full amount of claim with costs—*Ex.*

The Legal News.

VOL. VIII. AUGUST 1, 1885. No. 31.

The Lauderdale Peerage case, the facts of which will be found on page 193 of this volume, has been decided in favour of Major Maitland. The report of the decision of the House of Lords has not yet appeared, but the effect of the judgment is to maintain the validity of the marriage of Sir Richard Maitland in New York prior to the Revolution.

Some of our contemporaries, as for instance, the *Boston Law Record* and the *Columbia Jurist*, suspend publication during the Long Vacation, and this, of course, is a simple expedient for tiding over the dogdays. We have endeavoured hitherto to let the *Legal News* appear with as much regularity as our other engagements would permit, but this summer an unavoidable absence has delayed our issue for a few weeks. The numbers in arrear will be issued as speedily as possible, so that there will be no break in the volume. Some of our correspondents will please accept the same reason for apparent inattention to their communications.

THE CASE OF RIEL.

The Riel agitation has not made much impression on the country as yet. It does not follow that by dint of clamour an excitement in his favour may not be stirred up. The political agitator is impelled by necessities that render him very persistent, and he may, perhaps, be aware of the fact that a bad argument is almost as effective as a good one, and that a volley of contradictory arguments answer his purpose better than the most closely reasoned theme. His object is to captivate votes, and what is repulsive to one voter may be very taking to another. The speeches attributed to the speakers at the recent meetings at Montreal, Levis and Ottawa

strikingly illustrate the peculiar dangers of mass-meetings. The arguments put forth on these occasions seem to embrace three propositions utterly discordant and contradictory. The first is that Riel is not morally to blame; that he was moved by highly patriotic sentiments, and that his rising was justified in all save the result. If this proposition be true, he should not only escape punishment, but he should be rewarded; and we ought to sigh over the success of General Middleton and the Volunteers. With the people who believe this proposition it is impossible to discuss. They are the avowed enemies of the country in which they live, and their advice as to how to deal with Riel should be totally disregarded.

The next argument is that Riel is not morally responsible for his acts, because he is insane. It must be evident that this line of defence is incompatible with a justification of his acts. It would be a curious conclusion, even for the attendant physician of a lunatic asylum, to arrive at, that a man was mad because he was a patriot. In a legal aspect, it is not more tenable that a man is irresponsible because he enters on an ill-considered and hopeless enterprise. If we are to adopt the doctrine that the enormity of a crime is the moral justification of its author, then we had better declare without circumlocution that *crime is a disease*. The materialist has much to say in support of such a theory. How it will be received by the moralist, there can be little doubt. If reprehensible it is not less so because covertly advanced.

The third argument is put forward by Mr. L. O. David. Its form is unexceptionable. He says, the highest penalty of the law should not be inflicted on political criminals. If not the highest then why the lowest? The extent of punishment may, to some extent, be regulated by the idea of a fitting retribution; but the main guide of the law-giver in apportioning punishment is the danger of the offence to society. Now it cannot be questioned that no offence can be considered of greater magnitude in itself, or more perilous to a nation than an armed attack on its government. The common accompaniment of such a crime is, as it was in the present

case, wholesale robbery and many murders. I say then that it is not only the right, but the duty of government to protect its subjects from the repetition of such a dangerous offence by inflicting on its principal instigators the highest penalty recognized by law. To the airy philanthropist Mr. David's doctrine may appear a fine thing, but like many other sentimentalities it is anti-social.

There is but one argument for the commutation of Riel's sentence, that can be logically advanced, it is that he, and the population of which he is one, were suffering unendurable wrongs, and that the government provoked the outburst by its misdeeds. Of course this is a point on which ministers are perfectly informed; and if they are persuaded the accusation against them is true, their duty manifestly is to minimise the prisoner's punishment, regardless of the self-condemnation implied in so doing. So far as we know, however, there is nothing to support such a pretention. There was a good deal of declamation in Parliament about unsettled claims, and small individual grievances to be redressed, but no one ventured to suggest that there was any ground for absolving those who rose in rebellion on this account. Mr. Girouard, who seems rather favourably disposed towards Riel, says there is no ground for blaming the government in the matter.

Mr. Girouard has, however, drawn attention to one point hitherto unnoticed, or, at all events, not so definitely enounced, namely, that Riel could not be tried for *treason* under the statute giving criminal jurisdiction to a magistrate and six jurors. If there be anything in this objection, it will not be difficult to find lawyers in a position to assign causes of error on which the Minister of Justice will have to decide. Culpable as Riel notoriously is, he is entitled to a trial under the law, and those who most strongly condemn him, and who least sympathize with one, as solicitous about his own life as he was regardless of that of others, will be the readiest to say this much for him. But while doing so, public opinion should protest against any legal proceedings being made a loop-hole to get timid politicians out of a seeming difficulty.

R.

MARINE ZONE.

In Mr. Henry's recent admirable book on Admiralty Jurisdiction and Procedure,* the law in reference to the territorial coast-line is thus succinctly stated:—

"The territorial jurisdiction of a nation over waters within its jurisdiction, and within the three mile zone of the shore, does not extend to vessels using the ocean as a highway and not bound to a port of the nation. And a vessel may pass, in its voyage along the shore of another nation, without subjecting itself to the law of the littoral sovereign, and retain all the rights given by the law of its flag. This authority or claim of jurisdiction over the ocean within the three mile zone of the coast, is said and shown by Lord Chief Justice Cockburn to be a shrinkage of the claim of jurisdiction over the *mare clausum*, which was never acknowledged, and is now abandoned, and to exist only for the protection and defence of the coast and its inhabitants. Mr. Webster, in his letter to Lord Ashburton, quoted in Wheaton's Law of Nations, says:—'A vessel on the high seas, beyond the distance of a marine league from the shore, is regarded as part of the territory of the nation to which she belongs, and subjected, exclusively, to the jurisdiction of that nation. If against the will of her master or owner, she be driven or carried nearer to the land, or even into port, those who have, or ought to have control over her, struggling all the while to keep her upon the high seas,' she remains 'within the exclusive jurisdiction of her government.' This was written in the case of the *Creole*, an American vessel, carried into Nassau by persons who had been slaves in Virginia. The same reason which governs in the case of a vessel driven by weather or by violence within the three mile jurisdiction, applies to a vessel the necessities of whose voyage compel her to pass within the same zone."

The summary above given exhausts the subject in its relation to the civil side of admiralty. The probability, however, a few

* The Jurisdiction and Procedure of the Admiralty Courts of the United States in Civil Causes on the Instance side. By Morton P. Henry. Philadelphia: Kay and Brother, 1885.

months back, of a collision on our seas between Great Britain and Russia, led to an examination of the same question in its relation to the extent of the territorial marine sovereignty which entitles a neutral to preclude belligerents from discharging artillery on its marginal waters. The same question may at any time arise in reference to the discharge, either maliciously or negligently, of dangerous projectiles at sea, in such a way as to threaten or commit injury on shore.

On this interesting question the following observations may be made:—As is well known, it was for a long time held in England, that the sovereign is entitled to exercise police jurisdiction over a belt of sea extending three miles from his coast. The reason that was given for this limit was that cannon balls were, in those days, not known to exceed three miles in range, and that if the three mile limit was secured, a sovereign would be fully able to protect his inshores from marauders. Nor does this reason apply exclusively to hostile operations. We can conceive, for instance, of a case in which armed vessels of nations, with whom we are at peace, might select a spot within cannon range of our coast for the practice of their guns. A case of this character took place not long since in which an object on shore was selected as a point at which to aim for the purpose of practicing, projectiles to be thrown from the cruiser of a friendly power. Supposing such a vessel to be four miles from the coast, could it be reasonably maintained that we had no police jurisdiction over such culpable negligence? Or could it be reasonably maintained that marauders, who at the same time would not be technically pirates, could throw projectiles upon our shores without our having any opportunity whatever of bringing them to justice? The answer to such questions may be drawn from the reason that sustained a claim for a three mile police belt of sea in old times. This reason authorises the extension of this belt for police purposes to nine miles, if such be the range of cannon at the present day. This, it should be remembered, does not subject to our domestic jurisdiction all vessels passing within nine miles of our shores, nor does it give us an exclusive right to fisheries

within such a limit, or within such greater limit as greater improvements in gunnery might suggest. But following the distinction taken by Mr. Henry, we feel entitled to say that our coast authorities should have police jurisdiction over all offences committed by persons on shipboard which take immediate effect on shore. This jurisdiction, however, would not be in the Federal courts, supposing that the injury be inflicted within the bounds of a State. The offence, having taken effect within a State, would fall within the range of State jurisdiction.

That a sovereign has a police jurisdiction over all offences committed by means of shot from a ship taking effect on shore is maintained by very high authority. "The extension," says Perels (*Das Internationale öffentliche Seerecht der Gegenwart*), "of the line depends on the range of cannon shot at the particular period. It is however at such period the same for all coasts." To this effect is cited Martens, *Précis* i, p. 144; Bluntschli, § 302; Heffter, § 75; Klüber, § 130; Ortolan, i, 153; and Schialtarella, *Del Territorio*, p. 8.

Mr. Lawrence thus states the rule: "The waters adjacent to the coast of a country are deemed within its jurisdictional limits only because they can be commanded from the shore." (Note to Wheaton, p. 846.)

According to Gessner, "*Les droits des riverains ont été augmentés par l'invention des canons rayés.*" As far as a State can protect itself, so far does its jurisdiction extend. (Kent, i, p. 158.) "*La plus forte portée de canon selon le progrès commun de l'art à chaque époque.*"

"Inasmuch as cannon-shot can now be sent more than two leagues, it seems desirable to extend the territorial limits of nations accordingly. *The ground of the rule is, the margin of the sea within reach of the land forces, or from which the land can be assailed.*" (Field Int. Code, 2nd ed., § 29.)

"It is probably safe to say," says Mr. Hall (Int. Law, 127), "that a State has the right to extend its territorial waters from time to time at its will, with the now increased range of its guns, though it would undoubtedly be more satisfactory than an arrangement upon the subject should be arrived at by common consent."

The United States, following the precedent of Great Britain, have made it an offence to transship foreign goods within four leagues of the coast; * and this has been held by the Supreme Court of the United States to be consistent with international law.† It is no doubt argued by Sir R. Phillimore, that a statute of this class cannot be enforced against foreign States unless by adopting a similar provision they have incorporated it, so far as concerns the parties, into the Law of Nations. But it may be replied that a State cannot be expected to permit the waters surrounding it, at least within cannon shot of the shore, to be the site of smuggling adventures, or of the illegal transfer of goods; and so far as this limit goes, it should be entitled to enforce its rights against all intruders. It would seem right, therefore, that for the two purposes of defence against aggression and prevention of interference with its trade, a State should have jurisdiction over the seas washing it, as far as cannon shot extends. If there be no such jurisdiction, there would be no tribunal having cognizance of the offence of throwing projectiles from the sea on to the shores. The offence is not piracy by the Law of Nations, no matter how great may be the damage inflicted. It is not an offence by Federal statute. But no matter how great may be the distance at which the projectile is thrown, the offence, if consummated in a State, is subject to such State.—*Francis Wharton in Albany Law Journal.*

COURT OF QUEEN'S BENCH, MONTREAL.†

Faits et articles—Divisibilité de l'aveu—Réponse invraisemblable—Preuve contraire—Circonstances—Art. 1243 C.C. et 231 C.P.C.—Jugé:—Que l'aveu d'une partie qui reconnaît avoir reçu une somme d'argent réclamée par l'action, mais qui prétend avoir reçu la dite somme à titre de don et non à titre de prêt, peut être divisé lorsque cette prétention paraît tout à fait invraisemblable en vue des circonstances de la cause et du caractère des parties. Et l'admission contenue dans l'aveu

* That a seizure of vessels engaged in an illegal trade is not limited to a range of three miles from shore, see *Church v. Hubbard*, 2 Cranch, 187.

† *Church v. Hubbard*, 2 Cranch, 187.

‡ Reported in full in *Montreal Law Reports*, 1 Q.B.

ainsi divisé peut servir de commencement de preuve par écrit, de manière à permettre l'introduction de la preuve testimoniale pour contredire la prétention invraisemblable de la partie interrogée, et pour établir les véritables circonstances.—*Raymond dit Lajunesse, appellant, et Latraverse, intimé.*

Vente—Revendication—Privilège—Faillite—Insolvabilité—Livraison—Art. 1998, C.C.—Jugé:—1o. Que les provisions de l'article 1998 C.C. limitant l'exercice du privilège du vendeur aux quinze jours qui suivent la vente dans les cas de faillite, s'appliquent non seulement au cas de faillite sous l'empire d'un acte de faillite, mais au cas d'insolvabilité sous le droit commun, quand un commerçant cesse ses paiements (Art. 17, § 23).

2o. Que lorsque l'acheteur y consent, le vendeur qui est dans les conditions voulues pour revendiquer, peut se faire remettre à l'amiable les marchandises vendues, sans avoir besoin de les faire saisir par voie de revendication.

3o. Que l'expression "les quinze jours qui suivent la vente" dans le dit art. 1998, doit s'entendre de la vente parfaite, et partant si les marchandises sont vendues au poids, au compte ou à la mesure, et non en bloc (Art. 1474, C.C.), le délai pour revendiquer ne commencera à courir que du moment où elles auront été pesées, comptées ou mesurées.—*Thibodeau et al., appelants, et Mills et al., intimées.*

Fabrique—Autorisation à poursuivre—Appel—Procédure.—Jugé:—(Sir A. A. Dorion, J.C., et Cross, J., différenciant)—1o. Que le bureau ordinaire d'une fabrique peut autoriser des poursuites pour le recouvrement des revenus ordinaires de la fabrique et pour l'obtention d'un titre nouvel.

2o. Que cette autorisation n'a pas besoin d'être spéciale; mais qu'une autorisation générale de prendre des procédés légaux contre ceux qui sont endettés envers la fabrique, sans spécifier le nom de chaque débiteur, est suffisante.

3o. Que le défaut d'autorisation pour appeler dans une action de ce genre ne peut pas être invoqué pour la première fois à l'audition de la cause en appel, quand il n'a pas

été invoqué dans le cours de la procédure et que les procureurs de l'appelant n'ont pas été mis en demeure de produire leur autorisation. (*Sembler*, 1o. que l'appel en telles matières devrait être autorisé d'une manière tout aussi formelle que l'action en première instance; 2o. que le bureau ordinaire de la fabrique pourrait donner l'autorisation requise pour cet appel).—*Les Curé et Marguilliers de l'Eglise et Fabrique de la Paroisse de Ste. Anne de Varennes*, appelants, et *Choquet*, intimé.

SUPERIOR COURT.—MONTREAL.*

*Negotiability of Note—Transfer and Signification of Transfer—Arts. 1570, 1571 C.C.—Held:—*1. That a non-negotiable note endorsed by payee in full, and transferred to a third party, may be collected by the latter in his own name from the maker, if signification of the transfer is duly made upon him.

2. That such signification of transfer need not be in authentic form, but may be *sous seing privé*. (In Review.)—*McCorkill v. Barrelet*.

*Quality to sue—C.C.P. 14, 19—Receiver to corporation domiciled in Ontario.—Held:—*That a receiver, duly appointed and authorized under the laws of Ontario to represent in judicial proceedings a corporation (in liquidation) domiciled in that province, may also appear in his quality of receiver in judicial proceedings before the courts of the province of Quebec.—*Giles ex qual. v. Faneuf*.

*Secrétaire-trésorier—Liste électorale—Défaut de transmission au Régistrateur—Officier public—Avis d'action—Défense en droit—Jugé:—*1o. Que le secrétaire-trésorier d'une municipalité ne peut être poursuivi pour le recouvrement de la pénalité édictée par la section 38 de l'acte électoral de Québec, en cas de retard dans l'envoi d'un double de la liste électorale au registrateur du comté, si c'est le conseil de la municipalité qui a causé ce retard en retenant la liste jusqu'après le délai établi

par la loi, surtout lorsque le secrétaire a envoyé la liste des électeurs aussitôt que le conseil eût terminé l'examen de la dite liste.

2o. Qu'un officier public n'a droit à un avis d'action d'un mois que lorsqu'il est poursuivi à raison d'un acte fait par lui dans l'exercice de ses fonctions, et non à cause de l'omission de remplir un devoir que la loi lui imposait.

3o. Que le défaut de tel avis ne peut faire la matière d'une défense en droit, mais doit être plaidé au mérite, afin d'établir la bonne ou mauvaise foi de l'officier public dans l'exercice de ses fonctions.—*Jodoin v. Archambault*.

*City of Montreal—37 Vict. c. 51, ss. 21, 22, 25, 32—Petition to set aside election as Mayor of Montreal—Qualification of Petitioners—Interest in contracts—Naturalization Act, 1870, (Imperial)—Naturalization Act, 1881, Canada, s. 9.—Held:—*1o. That the qualification of the plaintiffs, in an action to set aside the election of defendant as Mayor, may be examined into, though the names of the plaintiffs be on the voters' list, and it may be shown that their names are on the voters' list by error.

2o. The fact that the defendant, when elected Mayor of Montreal, was proprietor of a newspaper which, at the time of the election, was publishing advertisements for the Corporation, is not sufficient to void the election, in the absence of any evidence to show that the defendant at the time of his election was receiving a pecuniary allowance from the city.

3o. Where the defendant, some years previous to his election as Mayor, was naturalized as a citizen of the United States, and on his return to Canada failed to comply with the provisions of the Imperial Naturalization Act, 1870, in order to recover his status of British subject, but a few days subsequent to his election made the declaration and took the oath prescribed by the Naturalization Act, Canada, 1881, within two years after the coming into force of the last mentioned Act, that the election was thereby made good and valid.—*Ste. Marie et al. v. Beaugrand*.

* Reported in full in *Montreal Law Reports*, 1 S.C.

Mandat ad litem—*Payements faits au procureur ad litem*.—*Jugé*:—Que le procureur *ad litem* ne peut, comme tel, recevoir les sommes pour lesquelles sa partie a obtenu jugement et en donner valables quittances.

20. Qu'en supposant que d'après l'usage, l'avocat ayant un mandat *ad litem*, aurait tacitement le pouvoir de retirer les sommes pour le recouvrement desquelles il est chargé d'instituer des poursuites; cependant, il appert, dans le cas actuel, que James M. Glass aurait retiré après jugement la somme en question en cette cause, dans un temps où son mandat était terminé et éteint, et que l'usage susmentionné ne pourrait même pas trouver ici son application.—*Cloran v. Mc-Clanaghan, et McClanaghan*, oppt.

Husband and wife—*Necessaries for family*—*Credit given to wife*.—C. C. 1317.—*Held*:—Where a wife *séparée de biens* living with her husband, orders goods for the maintenance of the family, and they are charged to her in the books of the vendor, and her husband is without means, that she is liable for the whole cost thereof under the provisions of C. C. 1317.—*Merrill et al. v. Griffin*.

JURISPRUDENCE FRANÇAISE.

Succession—*Acceptation tacite*—*Femme mariée*—*Immixtion du mari*.

Une femme mariée peut être réputée avoir accepté purement et simplement une succession, qui lui est échue, lorsque son mari s'étant immiscé dans les affaires de ladite succession, l'acte d'immixtion de celui-ci a été connu d'elle, sans qu'elle ait protesté.

(19 juin 1885. Trib. Civ. de Louléans. Gaz. Pal. 23 juin 1885.)

Prescription—*Interruption*—*Suspension*—*Saisie-arrêt*.

La saisie-arrêt pratiquée par un créancier sur une somme due à son débiteur, est interruptive, mais non suspensive de la prescription qui court au préjudice de ce dernier au profit du tiers-saisi.

(28 mars 1884. Cour d'Appel de Besançon. Gaz. Pal. 30 juin 1885.)

Assurances contre l'incendie—*Primes portables*—*Défaut de paiement*—*Déchéance*.

10. La clause d'une police d'assurances contre l'incendie d'après laquelle les primes ont été stipulées portables au siège local de la compagnie dans les quinze jours de leur échéance, à peine de déchéance du droit à l'indemnité en cas de sinistre, et sans qu'il soit besoin de mise en demeure, est licite et doit être appliquée si la Compagnie n'a pas modifié par des agissements ultérieurs les termes du contrat.

Alors surtout qu'après l'échéance, la compagnie a averti l'assuré, par une lettre recommandée, des conséquences de son défaut de paiement.

20. Aucune dérogation à la stipulation de portabilité ne saurait s'induire du paiement de la première prime au domicile de l'assuré, cette prime se payant au moment de la signature du contrat, qui ne commence à produire effet qu'après ce versement.

30. L'usage de la Compagnie de faire présenter les quittances des primes successives au domicile de l'assuré, ne peut être considéré comme ayant rendu les primes quérables, de portables qu'elles étaient, et comme ayant par suite subordonné la déchéance à une mise en demeure préalable, alors surtout que l'assuré n'a pas payé la prime lors de cette présentation... Ou lorsque la Compagnie s'est expressément réservé le droit de réclamer les primes à domicile, en ajoutant que l'assuré ne pourrait s'en prévaloir à son encontre.

Divorce—*Refus du devoir conjugal*—*Injure grave*.

Le refus persistant du mari d'accomplir le devoir conjugal constitue à l'égard de la femme une injure grave suffisante pour que le divorce soit prononcé entre les deux époux.

(3 fév. 1885. Trib. Civ. de Tours. Gaz. Pal. 3 juillet 1885.)

Assurance contre les accidents—10. *Patron*—*Ouvrier*—*Prélèvement des primes sur les salaires*—*Action directe contre l'assureur*—20. *Clause de déchéance*—*Renonciation à l'action contre le patron*—*Clause illicite*.

10. L'assurance qu'un patron contracte contre les accidents professionnels, au profit de ses ouvriers, qui en paient les primes au moyen de retenues que celui-ci opère sur leurs salaires, constitue une véritable gestion de l'affaire d'autrui dans les termes de l'art. 1372 C. Civ., au regard des ouvriers, qui ont dès lors, en cas d'accident, une action

directe contre la Compagnie d'assurances en paiement de l'indemnité convenue.

20. La clause d'une police d'assurance contre les accidents, qui frappe de déchéance l'ouvrier, qui aurait préalablement intenté contre son patron une action en responsabilité fondée sur l'art. 1382 C. Civ., est nulle comme contraire à l'ordre public.

La nullité d'une telle clause n'entraîne d'ailleurs pas nécessairement celle du contrat, qu'elle n'affecte ni dans sa cause, ni dans son objet essentiel. (1er juil. 1885. *Cass. — Gaz. Pal.* 12-13 juil. 1885).

Copropriété—Terrain—Location — Construction — Indivision conventionnelle—Licitation.

Si les constructions sont considérées comme étant l'accessoire du sol, il en est autrement lorsqu'il résulte de la convention que c'est le constructeur de l'édifice qui doit en rester le propriétaire. Il en est ainsi notamment lorsque le propriétaire du sol l'a donné à bail au constructeur avec promesse de vente, si cette promesse n'a pas été réalisée, à défaut de paiement du prix stipulé. Dans ce cas le propriétaire du sol et le propriétaire des constructions sont en état d'indivision conventionnelle; par suite, la licitation des immeubles peut être demandée et ordonnée en vertu du principe posé par l'art. 815 C. Civ.

(6 mai 1885. *Cour d'Appel de Paris. Gaz. Pal.* 14-15 juil. 1885).

Prodigue—Lettre de change—Manœuvres frauduleuses.

Le prodigue, pourvu d'un conseil judiciaire, n'est pas recevable à invoquer, à l'égard des tiers, son incapacité relative, alors qu'il a surpris leur bonne foi à l'aide de manœuvres de nature à produire et à maintenir l'erreur sur l'état de sa personne.

(21 mars 1885. *Cour d'Appel de Paris. Gaz. Pal.* 14-15 juil. 1885).

PAYMENT TO ATTORNEY.

To the Editor of the LEGAL NEWS:

SIR,—The judgment in the case of *Cloran v. McClanaghan* and *McClanaghan*, opposant, (M.L.R., 1 S.C. 331) ought not to pass unnoticed. Not that I wish to criticise the application of the law by the learned judge, but it is with the law itself that I find fault, and the sooner it is altered the better it will be for the protection of honest men. Here is a man, a member of the Bar, who is entrusted with the collection of a claim (presumably a promissory note or an account); the lawyer

puts the legal machinery in motion and takes judgment against the debtor, who, naturally and logically enough for one who has not read Pothier, Toullier, Laurent and other law books, pays the person whom his creditor has employed to collect the claim. The lawyer does not account to his mandator (either the latter's confidence has been misplaced, or perhaps there is an unsettled account between the two). Ordinary men of business would say to the creditor:—"If you have employed an unfaithful or unprincipled attorney to attend to that collection, you must blame yourself for your imprudence;" or, "If you are indebted to your attorney, you must allow him to pay himself out of the amount collected." But no; the law steps in to exonerate the mandator from the consequences of his own acts, and to compel an innocent debtor, who has paid in good faith to the man he found in charge of the claim, to pay the debt a second time. The unfortunate debtor discovers to his amazement and his disgust that the attorney of his creditor had a right to demand but had not the right to receive, that the debt can be legally paid to an obscure bailiff in whose hands the advocate has placed an execution, but that payment to the advocate himself is unauthorised and illegal. I think that such a law ought to be changed; claims are entrusted to lawyers for collection; how can they collect if they cannot receive payment? If anybody must lose in consequence of the dishonesty of the collector, it should be the one who has seen fit to employ him, not the innocent debtor who has paid in good faith.

But this case suggests something more: there is a moral obligation on the part of the members of the Bar of this Province to prevent such a disgrace, such an iniquity, as to oblige this poor defendant to pay over again. The honor of the profession is at stake. Subscriptions have been made for less worthy objects. If Glass has received the money and is dishonestly keeping it from his client, I say that it would be a shame and a disgrace to a profession which calls itself, and is undoubtedly, honorable, and which licensed Glass and thereby proclaimed him worthy of confidence, to allow the debtor to pay the amount a second time under such circumstances. Let us come to the relief of that unfortunate defendant; pass the hat around, Mr. Editor, and I will contribute my share.

ADVOCATE.

Montreal, 1st Aug., 1885.

THE CIRCUITEERS.

SCENE. *The Banks of Windermere. Sunset.*

ADDISON (1). SIR GREGORY LEWIN. (2).

A. How sweet, fair Windermere, thy waveless coast!

'Tis like a goodly issue well engrossed.

L. How sweet this harmony of earth and sky!
'Tis like a well-concerted *alibi*.A. Pleas of the Crown are coarse, and spoil one's tact,
Barren of fees and savoring of fact.L. Your pleas are cobwebs, narrower or wider,
That sometimes catch the fly, sometimes the spider.A. Come let us rest beside this prattling burn,
And sing of our respective trades in turn.

L. Agreed! our song shall pierce the azure vault:

For Meade's (3) case proves, or my Report's in fault,

That singing can't be reckoned an assault.

A. Who shall begin?

L. That precious right, my friend,
I freely yield, nor care how late I end.A. Vast is the pleader's rapture, when he sees
The classical endorsement—"Please draw pleas."L. Dear are the words—I ne'er can read them
frigidly—"We have no case, but cross-examine
rigidly."A. Blackhurst (4) is coy, but sometimes has
been wonTo scratch out "Hoggins (5)" and write
"Addison."L. Me Jackson (6) oft deludes; on me he rolls
Fiendlike his eye, then chucks his brief
to Knowles (7).A. What fears, what hopes through all my
frame did shootWhen Frodsham's breeches, Gilbert, felt
thy boot (8)!L. O! all ye jail-birds, 'twas a day of sulks
When Roger Whitehead flitted to the hulks.

(1) A special pleader.

(2) A criminal lawyer and reporter of Lewin's Crown Cases.

(3) Meade and Belt's case. 1 Lewin, C. C. 184, per Holroyd, J.: "No words or singing are equivalent to an assault."

(4) An attorney of Preston.

(5) Hoggins, a barrister in the Northern Circuit; afterwards a queen's counsel.

(6) An attorney.

(7) C. J. Knowles, on the Northern Circuit; afterwards a queen's counsel.

(8) Frodsham, an attorney, was summarily ejected by Gilbert Henderson, recorder of Liverpool, from his chambers for some offensive words used by him during an arbitration. Afterwards Frodsham sued Henderson for damages for the assault. His counsel was Sergeant Cross. John Williams, afterwards a judge of the Court of Queen's Bench, led for the defence, and concluded his speech to the jury by saying: "I vow to God, gen-

A. Thoughts much too deep for tears subdue
the courtWhen I *assumpnit* bring, and god-like waive
a tort.L. When witnesses, like swarms of summer
flies,I call to character, and none replies,
Dark Attridge (9) gives a grunt, the gentle
bailiff sighs.A. A pleading fashioned of the moon's pale
shine

I love, that makes a youngster new-assign.

L. I love to put a farmer in a funk,
Then make the galleries believe he's
drunk.A. Answer, and you my oracle shall be,
How a sham differs from a real plea?L. Tell me the difference first, 'tis thought
immense,

Betwixt a naked lie and false pretence.

Now let us gifts exchange; a timely gift
is often found no despicable thrift.A. Take these, well worthy of the Roxburghe
Club,Eleven counts struck out in Gobble *versus*
Grubb.L. Let this within thy pigeon-holes be packed.
A choice conviction of the Bum-boat act.

(10)

A. I give this penknife-case, since giving
thrives;It holds ten knives, ten hafts, ten blades,
ten other knives.L. Take this bank-note (the gift won't be my
ruin),'Twas forged by Dade and Kirkwood; see
first Lewin (11).A. Change we the *renue*, Knight; your tones
bewitch,But too much pudding chokes, however
rich,Enough's enough, and surplusage the rest.
The sun no more *gives color* to the west,And one by one the pleasure-boats forsake
Yon land with water covered, called a lake.'Tis supper-time; the sun is somewhat far,
Dense are the dews, though bright the even-

ing star;

And Wightman (12) might drop in and eat
our char (13).

tlemen, I should have done the same thing myself—an insult—a kick—and a farthing—all the world over!" The jury accordingly found for the plaintiff with one farthing damages. Cross tied up his papers and remarked: "My client has got more kicks than half-pence." But it was always a matter of doubt whether he knew he was saying a good thing or not. He had never before said anything to provoke such a suspicion.

(9) Sir Gregory Lewin's clerk.

(10) 2 Geo. III. ch. 28. "An act to prevent the committing of thefts and frauds by persons navigating bum-boats and other boats upon the River Thames," Rep. 2 & 3 Vict. ch. 47, § 24.

(11) 1 Lewin, C. C. 145.

(12) Afterwards a judge of the Court of Queen's Bench.

(13) These lines are by J. L. Adolphus, the well-known reporter.

The Legal News.

VOL. VIII. AUGUST 8, 1885. No. 32.

Under the title of "Constitutional Questions in the Province of Quebec," Messrs. J. P. Sexton and L. H. Pignolet have summed up briefly the decisions to which the B. N. A. Act has given rise, as well as the principal arguments for and against the propositions advanced on either side. The pamphlet will be found interesting by those who are examining the scope of provincial and federal jurisdiction.

Even assuming what it is rather difficult to credit, that the motive of the *Poll Mall Gazette* in spreading filth before the whole world was a worthy one, the *Law Journal* points out that it is no defence that the motive of the publication was honestly to expose and condemn what ought to be condemned. "This," remarks the *Journal*, "was held once for all in 1868 by Chief Justice Cockburn and Justices Blackburn, Mellor and Lush, in the case of the '*Confessional Unmasked*' (37 Law J. Rep. M. C. 89). Lord Campbell's Act (20 & 21 Vict. c. 83) allows a magisterial order for the seizure of books and papers which are of such a character that the publication of them would be a misdemeanour. The Metropolis, City of London, and Town Police Clauses Acts impose a penalty of 40s. on selling such publications in the streets, and generally, the writers, printers, publishers, and sellers are liable to fine and imprisonment upon conviction by a jury."

The Solicitors' Journal, referring to the opinion expressed by the late Lord Chief Justice Cockburn, that handwriting is the one unchanging characteristic of a man, says:—"It appears to us that if entertained at all it ought to be entertained only subject to some important qualifications. There is a period in the life of most people during which the handwriting is unformed, and for the purpose of comparison, writing during this period should be excluded. We are

constrained to say, as the result of some observation, that in some men this period lasts very long. There is a certain member of Her Majesty's Privy Council, who, although he must have covered reams of paper during the course of a busy life, never seems to have thought it necessary to acquire any formed style of handwriting. Being a person of strong will, it is quite conceivable that he may, even yet, some day resolve to write a decent and uniform hand, and if he makes that resolution he will unquestionably carry it out. But in that case what would become of the evidence of identity afforded by his handwriting? Suppose the late Dean of Westminster had devoted himself for a week to forming a hand which could be read, does any one doubt that he would have succeeded in his purpose, and that his style of (so-called) handwriting would have wholly changed? Again, it is obvious that physical changes in the hand or arm may occasion the adoption of a different handwriting. Disuse for a lengthened period of the habit of writing may conceivably lead to forgetfulness of the mode in which letters were formerly framed. Letters written in haste are apt to differ considerably from letters written with deliberation, and letters written with a fine pointed pen are often singularly unlike letters written with a quill pen. And again, peculiarities in handwriting are apt to be dropped. There was a curious instance of this in the letters of the genuine Roger Tichborne. From a very early period he had adopted a habit of placing a dot over the letter 'y' whenever it occurred at the end of a word, but in his letters after the year 1851 this peculiarity was entirely absent. For some reason or other he had abandoned the habit. This is, of course, an extreme instance of eccentricity, but there are few people without some peculiar habit in writing. We know, for instance, a learned and very distinguished queen's counsel, the chief characteristic of whose handwriting is the habit of crossing his 't's' over instead of through the vertical stroke. We know an eminent solicitor whose peculiarity is the horizontal tail which he adds to certain letters occurring at the end of words. But it is quite possible that these persons

may drop these habits. Perhaps they may do so if they read these remarks. The general results at which we arrive are, first, that no reliance can be placed on what we may call tricks of handwriting, or even on the formation of particular letters. The general character of a man's handwriting may afford such evidence; but even as to this, caution is requisite to ascertain that the handwritings compared were written at or about the same date. We doubt whether it is safe to assume that any man will, throughout the whole of his life, retain even the same general character of handwriting. And lastly, it may be questioned whether Lord Chief Justice Cockburn was right in his assertion that 'there is nothing in which men differ more than in handwriting.' We should be rather disposed to think that very many persons write alike."

COUR DE POLICE.

MONTRÉAL, 8 juillet 1885.

Coram DEMONTIGNY, Magistrat.

LARUE V. DENAULT.

Parjure — Fait matériel — Informalités — Assermentation — Faits et articles.

- Jugé :—1o. *Que dans une accusation de parjure, la question de savoir si le serment a été volontaire et corrompu est une question de fait qui doit être laissée à l'appréciation du jury.*
- 2o. *Que du moment qu'il y a affirmation ou déclaration prise de vive voix, par affidavit, par interrogation ou déposition sous serment, le fait est considéré essentiel pour servir de base à une accusation de parjure.*
- 3o. *Que les réponses sur faits et articles doivent être prises par le juge ou par le protonotaire, et ne peuvent l'être régulièrement par un sténographe officiel, sans avoir été reconnues devant le juge ou le protonotaire.*
- 4o. *Que l'on ne peut baser une accusation de parjure sur une déposition irrégulièrement prise.*

Le défendeur est traduit devant le magistrat sur accusation de parjure, c'est-à-dire d'avoir devant la Cour Supérieure du district de Montréal, le 7 avril dernier, répondu faus-

sement, volontairement et avec corruption, à des questions sur Faits et Articles.

A l'enquête préliminaire, il fut prouvé que le défendeur a comparu cour tenante pour répondre *visu voce* à des questions sur faits et articles, dans une cause où il était défendeur.

Que ces réponses ont été reçues par un sténographe officiel assermenté et que lui-même l'accusé a été assermenté.

Qu'à la question 2e, "Is it not true that you purchased from Albert Edouard Fillingrin, brother of the said plaintiff all the right of said Albert Fillingrin in the estate and succession of his father and mother for the sum of three hundred dollars;" l'accusé a répondu faussement: "Non, je les ai achetées pour la somme de \$90 que j'ai payé comptant."

Qu'un acte notarié fait foi qu'en effet il a payé ces droits \$300.

Le défendeur souleva devant le magistrat, à l'enquête préliminaire, les questions suivantes :

Que pour constituer le parjure il faut un fait matériel que la personne sous serment jure faux volontairement et par corruption, et que dans l'espèce l'accusé a juré un fait insignifiant à la cause.

Que d'ailleurs il n'avait aucun intérêt à en agir ainsi parce que le fait n'influait aucunement sur la cause, et parce qu'il y avait un acte authentique qui constatait le fait. Que partant le serment n'a pas été corrompu.

Qu'il est le résultat d'une erreur involontaire, l'accusé confondant la vente faite par le demandeur avec celle faite par son frère.

Que le serment n'a pas été régulièrement donné et suivant les formalités exigées dans la réception des faits et articles.

DEMONTIGNY, J. Parmi les points soulevés par l'accusé, il y a des questions qui doivent être soumises au petit juré et d'autres qui sont du ressort du magistrat fonctionnant ministériellement.

Quant à savoir si le serment a été volontaire et corrompu, ceci dépend des circonstances qui doivent être laissées à l'appréciation d'un jury ou d'un autre procès.

Il en est de même de la question de savoir si l'accusé avait intérêt à nier ce qu'il a nié.

Apparemment il n'avait pas intérêt, mais encore est-il que le défendeur pouvait avoir posé cette question pour passer à une autre.

D'ailleurs, d'après la s. 7 du ch. 23 de 32-33 Victoria: "Tous témoignages et preuves, qu'ils soient pris de vive-voix ou par affidavit, affirmation ou déclaration, interrogation ou déposition, seront réputés et considérés essentiels au point de vue de la responsabilité encourue par toute personne d'être poursuivie et punie pour parjure volontaire et rompu ou pour subornation de parjure."

La question de savoir si le serment a été régulièrement pris est la plus grave qui se soit soulevée dans la cause.

L'accusé avait été appelé, comme défendeur dans une cause pendante en Cour Supérieure par le demandeur William Fillingrin, à répondre *viva voce*, cour tenante, aux interrogatoires sur faits et articles qui devaient là lui être posés.

Or l'art. 226 du C. P. C. dit: "La partie peut aussi être assignée à venir répondre sur faits et articles de vive voix, cour tenante, ou aux séances d'enquête ou devant le jury; et ses réponses sont alors prises par le juge ou le protonotaire; et le juge peut proposer tous autres interrogatoires qu'il considère nécessaires et pertinentes. Si la partie refuse de répondre à ces interrogatoires, le juge les fait mettre par écrit au dossier et ils sont réputés avérés."

Or les réponses quoique prises cour tenante, n'ont pas été prises ni par le juge ni par le protonotaire; mais par un sténographe officiel. Il n'appert pas que le défendeur ait reconnu ces réponses ni devant le juge ni devant le protonotaire.

Mais le sténographe n'a pas pouvoir de recevoir seul ainsi les réponses. Tout au plus pourrait-il agir sous la dictée du juge ou du protonotaire lesquels du moins devraient faire reconnaître les réponses par le parti qui les donne.

Il n'en est pas de même pour les enquêtes. Car alors la loi art. 263 C. P. C. si c'est devant le juge, et l'article 288 si c'est au long, permet au protonotaire de faire prendre les dépositions par des clercs et le statut 46 Vic., c. 26 permet aux sténographes de prendre le témoignage et leur dicte la manière de les prendre.

Mais quant aux réponses sur faits et articles le législateur n'a donné à aucun autre qu'au juge, au protonotaire le pouvoir de les recevoir. Et ce n'est pas étonnant que la loi entoure la procédure sur faits et articles de beaucoup de formalités, puisque ces réponses sont beaucoup plus importantes que les réponses d'un témoin et entraînent à de bien plus graves conséquences.

Les réponses aux interrogatoires ont donc dans cette cause été prises irrégulièrement.

Or, il a été jugé maintes fois et particulièrement dans les causes suivantes: *Regina v. Gibson*, 7 R. L. 574; *Regina v. Martin*, L. C. J. 156 et 7 R. L. 572, qu'il n'y a pas parjure dans une déposition prise irrégulièrement.

Je ne vois pas qu'il y ait lieu de faire subir un procès à l'accusé pour parjure quand il n'y a pas eu un serment régulièrement prêté.

Le défendeur fut déchargé.

(J. J. B.)

RECENT DECISIONS AT QUEBEC.*

Aveu Judiciaire. — Jugé: — 1. Qu'en règle générale l'aveu judiciaire est indivisible; — C. C. 1243.

2. Que l'espèce actuelle ne tombe pas sous les exceptions de l'art. 231 du C. P. C.

3. Qu'il n'y a pas, dans l'espèce actuelle, un commencement de preuve par écrit suffisant, même en disant l'aveu, et que la preuve faite, fut-elle légale, n'établit pas suffisamment le second prêt. Tessier, J., résume les faits comme suit: "Le demandeur Morin poursuit le défendeur Fournier pour \$688, balance de deux prêts, le premier de \$500 fait en mars 1877, le second de \$300 le 20 mai 1882. Le défendeur produisit une défense en fait, une exception de délai pour le premier prêt, et de prescription. Avec son exception, le défendeur produisit un billet promissoire de \$500 du 31 mars, 1877, que le demandeur lui avait remis en disant que ce billet étant prescrit par cinq ans, ne servait plus, et que le défendeur avait consenti à cela en disant "qu'il n'y a pas de prescription entre des honnêtes gens." Le demandeur n'ayant pas de preuve écrite pour prouver le deuxième prêt, interrogea le défendeur sur

faits et articles et il continua de l'interroger comme témoin sur les mêmes points. Les réponses du défendeur se résument à admettre le premier prêt et à nier le second, en ajoutant qu'il avait remis au prêteur \$175 sur le premier prêt, et que celui-ci les lui avait rapportées en disant de les garder à cinq par cent comme formant partie du premier prêt. * * * Le débiteur prouve sa bonne foi; il consent à reprendre le billet de \$500, après qu'il est prescrit; il n'essaie pas de s'en servir pour alléguer un paiement que la remise du billet au débiteur fait présumer en certains cas; il fait offrir par protêt notarié avant l'action le montant du premier prêt \$500, avec les intérêts. Au contraire, le créancier semble ne pas avoir une bonne mémoire des choses. Il allègue le premier prêt comme étant de 1878; il a amendé sa demande en substituant 1877 après l'aveu du défendeur; le créancier allègue le second prêt de \$300. Il est admis même de son côté qu'il n'était que de \$200, et que sur les \$300, il y avait \$100 qui avait été remis sur le premier prêt. Cela semble corroborer les prétentions du débiteur.—*Fournier v. Morin*. (En appel).

Procedure—Opposition—Contestation.—Jugé:—1. Que l'omission, par le créancier hypothécaire, de contester l'opposition afin de charge de la donatrice (Françoise Mathieu) en temps utile, le foreclot du droit de la contester après le jugement sur cette opposition et le décret, au moyen d'une requête civile ou tierce-opposition, à moins qu'il n'y ait preuve de dol, fraude, artifice ou informalité essentielle.

2. Que dans l'espèce actuelle, il n'y a pas de preuve de dol, fraude, artifice ou informalité essentielle.

3. Que le droit de la donatrice à sa rente viagère, participant du privilège de bailleur de fonds avec droit résolutoire, est fondé en équité et en loi, malgré l'omission du renouvellement de l'inscription de la donation, vis-à-vis d'un créancier postérieur qui a renouvelé l'inscription de son hypothèque, eu égard aux circonstances particulières de cette cause.—*Mathieu & Vachon et al.* (En appel).

Action pétitoire—Chemin de fer.—Jugé: Qu'un propriétaire a un recours direct, par action pétitoire, contre une compagnie de

chemin de fer qui se serait mise en possession d'un terrain pour sa voie ferrée, sans le consentement du propriétaire et sans lui faire d'offre préalable pour le terrain ainsi occupé.—*La Compagnie du Chemin de Fer Central & Legendre*. (En appel).

Procedure—Preliminary exception—C. C. P. 132.—Held, that the words "if he succeeds," in Art. 132 C. C. P., mean, if he succeeds in defeating the action, and that when the preliminary plea is a dilatory exception which has been maintained after the defendant has been forced, under Art. 131, to plead to the merits, and the defendant has not availed himself of his right to amend his pleas to the merits or plead anew, and the plaintiff succeeds upon the merits of the action as contested, the defendant cannot claim to be paid the costs of his contestation under Art. 132, but may on the contrary be condemned to pay them.—*La Banque Nationale v. Ross et al.* (In Review).

Hypothecary Action—Misdescription—Cadastral number.—Where the mortgaged property was described in the deed as being in Ste. Cécile, but was really in St. Fabien, and was so declared to be by the plaintiffs, *held*, that the action must be dismissed. *Held*, also, that the absence of a cadastral number in the notice of renewal of a mortgage, is fatal, and the correction of the notice, after the expiration of the delay for filing it, cannot be made retroactive.—*Rioux et al. v. Ouellet et al.* (In Review).

Cotisations d'Ecole—Action hypothécaire—Autorisation—Garantie—Tiers détenteur—Améliorations.—Jugé: 1. Que la stipulation qu'un prix de vente est la première hypothèque sur la propriété vendue n'est que la garantie qu'il prime les privilèges et les hypothèques enregistrés.

2. Que le tiers-détenteur, poursuivi hypothécairement, ne peut exiger que le poursuivant lui donne caution pour le paiement de ses impenses; ses droits se bornent à demander que le délaissement ne soit ordonné qu'à la charge de son privilège pour son paiement.

3. Les commissaires d'école peuvent, après l'expiration des délais indiqués par la loi, autoriser la confection des rôles de cotisation,

et ces rôles entrent en vigueur, sans autre formalité, 30 jours après l'avis de leur dépôt.

4. La copie d'une autorisation où la date et la composition de l'assemblée qui l'a donnée occupent le haut d'une feuille de papier à laquelle est annexé par un de ses coins, un petit morceau de papier portant une résolution certifiée *vraie copie* , autorisant la poursuite du défendeur pour ses cotisations, est une preuve suffisante de l'autorisation d'une poursuite hypothécaire pour cotisations d'école contre le défendeur.—*Commissaires d'école de St. Norbert v. Crépeau*. (En Révision).

Consul general — Declinatory exception — Chargé d'affaires.—*Held*, that a consul general does not enjoy exemption from liability to the civil jurisdiction of the Courts of the country.

Seemle, that if he is charged with some special mission in which he represents his government, and, as such, holds his *exequatur*, he enjoys such exemption.—*Leonard v. Premio-Real*.

Procedure—Seizure—Advertisement.—*Held*, 1. Where the sale, under a writ of *fieri facias de bonis et de terris* , has not taken place on account of an appeal to the Supreme Court, followed by the giving of security and by the judge's order to stay proceedings, the plaintiff is not entitled to a *venditioni exponas* , but must proceed by means of an *alias* writ of *fieri facias* .

2. That under a writ of *fieri facias de bonis et de terris* , the sheriff ought to advertise the sale of the immovables seized only after the moveables have been discussed.

3. That advertising the sale of the immovables is proceeding to their sale within the meaning of the prohibition clause of Art. 554 of the Code of Civil Procedure.—*Union Bank of Lower Canada v. Dawson, and Dawson*, opposant. (In Révision).

Servitudes—Rivière—Exploitation.—*Jugé* :—Que celui, dont la propriété borde une eau courante ne faisant pas partie du domaine public, peut utiliser et exploiter cette eau en y construisant une chaussée d'une hauteur suffisante pour faire marcher le moulin qu'il a construit sur sa propriété; que le propriétaire d'un moulin supérieur, auquel ces

travaux nuisent en y faisant refluer les eaux, ne peut demander qu'une indemnité et n'a droit à la démolition des travaux qu'à défaut du paiement de l'indemnité.—*Demers v. Germain*. (En Révision).

Chemin—Procès-verbal—Annulation—Action.—*Jugé*, 1. Que l'omission, dans une résolution nommant un surintendant spécial pour l'ouverture d'un chemin, de la date où le surintendant fera son rapport, n'est pas fatale.

2. Qu'une résolution du conseil, faisant un changement au procès-verbal préparé par le surintendant, est une homologation suffisante de ce procès-verbal.

3. Que les avis peuvent être publiés dans une seule langue dans les municipalités où, avant le Code Municipal, un ordre du Gouverneur en Conseil l'autorisait.

4. Que l'homologation, lundi, le 3 septembre, d'un procès-verbal pour l'ouverture d'un chemin, quand les avis publics informaient les intéressés qu'il serait pris en considération, lundi, le 6 septembre, est nulle;—et qu'elle est également nulle lorsque sept jours ne se sont pas écoulés entre l'avis public et la réunion du conseil où il a été homologué.

5. Que les procès-verbaux n'entrant en vigueur que 15 jours après l'avis public de leur homologation, le défaut de cet avis ne permet pas leur mise à exécution.

6. Que la promesse, par un intéressé, de faire sa partie d'un chemin ordonné par un procès-verbal dont l'homologation n'a pas été publiée, ne l'empêche pas d'invoquer la nullité de ce procès-verbal.

7. Que l'annulation d'un procès-verbal peut être poursuivie par action directe.—*O'Shaughnessy v. La Corporation de Ste. Clothilde de Horton*. (En Révision).

Qualité — Condamnation.—*Jugé*, que pour pouvoir prétendre qu'une partie qui a repris l'instance en qualité d'héritier bénéficiaire, a été condamnée *personnellement* au paiement des frais, il faudrait que la cour l'eut dit spécialement. Que si le mot " *personnellement* " ne se trouve pas dans le dispositif du jugement, le jugement devra être interprété comme ayant été rendu contre la partie en la qualité spéciale qu'elle a assumée en reprenant l'instance.—*Ogden & Dawson*. (En appel).

RECENT UNITED STATES DECISIONS.

Bailment—Implied contract on part of auctioneer to keep property insured.—The plaintiff left goods with an auctioneer to be sold, and, being assured by the auctioneer that sufficient insurance was carried to cover the goods deposited, did not insure them. The auction store and contents were burned; the insurance was enough to cover the plaintiff's loss, but not all the loss occasioned by the fire. Held, that the plaintiff could recover from the auctioneer the value of the goods destroyed.—*Thomas v. Cumisky*, Sup. Ct. Pa.

Bank—Certification of check by employee.—Where a bank either expressly or tacitly permits an employee to certify checks drawn upon it, it will be liable for the amount of a check so certified in the hands of a *bona fide* holder. Where the bank has limited the authority of the employee to certify checks to cases in which the drawer has funds in bank, and the employee negligently or fraudulently certifies a check when the funds called for by it do not exist, the bank, and not the innocent *bona fide* holder of the check, must bear the loss.—*Hill v. Nation Trust Co.*, Sup. Ct. Pa.

Fire Insurance.—Where the agent of an insurance company erroneously describes the property in an application for a policy of insurance prepared by him and signed by the insured, the company cannot in case of loss defend by reason of the misdescription. Where prompt notice of a total loss is given by the insured, the company cannot avoid payment on the ground of insufficient proofs of loss, unless it has pointed out to the insured the defects in the proofs furnished, and called for more specific proofs.—*Susquehanna Mut. Fire Ins. Co. v. Cusick*, Sup. Ct. Pa.

Municipal Corporation.—A municipal corporation is not liable for the acts or negligence of the board of health, authorized to make and enforce sanitary regulations, and constituted a separate body by the city charter.—*Bryant v. City of St. Paul*, Sup. Ct. Minn.

THE TESTS OF INSANITY.

In the course of summing up in the case of *Neave v. Hatherley*, an action brought by Miss A. A. Neave, to recover damages from the

defendant, a medical man, for alleged negligence in signing a certificate in July, 1881, that she had then been a person of unsound mind, Lord Coleridge said that it was important to notice how the plaintiff shaped her case. It came to this—that she said that she had always been of sound mind, that the defendant had certified to the contrary, and that in consequence she had suffered damage. No doubt if a medical man took upon himself the execution of a duty and did not bring to it reasonable care and skill he was liable for the consequences. If the plaintiff had in July, 1881, been of unsound mind, the conduct of the defendant would be immaterial, but, if not, the question would be whether his conduct in signing the certificate had been marked by a want of such reasonable care and skill. It would be lamentable if medical men were in such cases to be made responsible for honest mistakes, for the consequence must be that those who were in the higher ranks of that profession would refuse to sign certificates in lunacy cases, and alleged lunatics would be at the mercy of men in the lowest ranks of the profession. In a certain sense the examination by a medical man as to the mental condition of a person supposed to be of unsound mind must be a judicial inquiry, and he must act with a due sense of the responsibility which he incurs in the matter, and bring the best of his faculties to bear on the examination. He (the learned judge) had had quite recently occasion to consider very carefully what the character of such an examination ought to be, and in giving judgment in the case of *Regina v. Whitfield*, L. R. 15 Q. B. Div., he used words which he thought he had better now read to the jury. They were: "I will own that the experience I have had of the flimsy stuff on which perfectly sane men are sometimes incarcerated in lunatic asylums makes me, perhaps, a severe critic; but I am not content to consider this sort of thing an examination under the statute. It seems to me the merest travesty of an examination, and the elaborate system of protection and careful inquiry prescribed by the statute, if this is a legal compliance with it, is, to use an old phrase, 'a mockery, a delusion, and a snare.' Far better, in my judgment, to have

no provision for protection at all than provisions of which the proceedings in this case are to be held legally to satisfy. . . . If a negligent examination is actionable in the case of a medical man, it appears to me that a negligent examination is not an exercise of statutory jurisdiction in the case of justices. The case of *Hall v. Semple*, 3 F. & F. 350, with which I absolutely agree, shows to my mind that the statute requires that there should be a real inquiry, a real weighing and sifting of evidence, a real examination, a real, serious, and solemn exercise of judgment." The learned judge had only to say that he had there attempted to express his opinion deliberately as to what such an examination ought to be. Did the plaintiff come within the definition in the statute of "a lunatic, idiot, or person of unsound mind, and a proper person to be taken charge of and detained under treatment"? It was not suggested that she had been a lunatic or idiotic, but that she had been of unsound mind. The question whether or not a person was of unsound mind was one of the most difficult and abstruse problems into which the human mind could enter. It was a question on which certain practical tests had been laid down in books of authority—tests which were not, indeed, exhaustive, but the presence of which must be taken to be indications of unsoundness of mind. The learned judge said that the principal test as to unsoundness of mind was whether a person had delusions in the nature of a belief in things as realities which, in fact, had no existence. He emphatically dissented from the Attorney-General that unless every other means had first been exhausted, a person ought not to be placed in an asylum. The abuse of a thing was no proof that it had not a use, and early treatment in cases of unsoundness of mind was of the very greatest importance. People living in small houses had no power of making provision for such early treatment of relations who might be unsound in mind, while relegation at an early stage to a well-appointed asylum was calculated to have the best results. As to the delusions of the plaintiff, one was that a Jesuit conspiracy had existed in her mother's house. She believed that no evil existed or ever had existed

in which the Jesuits had not had a finger. If she had confined herself to saying that she believed Jesuits to be the allies of Satan and to be for ever seeking to sap the foundations of morality, that would be one thing, but it was quite another for her to have been possessed with a delusion that every servant in her mother's house was an emissary of the Jesuits. He (his lordship) was no judge in the matter of what people might be inclined to believe against the Jesuits, as one who was nearest and dearest to him was a member of the Society of Jesus. But it would be for the jury to say whether or not the plaintiff had been liable to delusions on the subject of Jesuit emissaries having been in her mother's house, of impropriety of conduct between her brother and the cook, and of poison having been administered to her as part of a Jesuit conspiracy. Were these or were they not ideas which a reasonable person could not have entertained? The plaintiff had made a charge against her nephew's nurse of having drugged him, and accused her of having done something to him at Whitby which had brought on a fit of partial paralysis, though it was clear that there had not been the slightest ground for any such imputations. She had believed that her mother's mind had been weakened by the sulphuric ether prescribed for her by the defendant. Mr. Hatherley had prescribed doses of a sixth of a drachm of sulphuric ether, and had stated that if Mrs. Neave had taken the whole drachm at one time it would not have affected her brain in any way. Then there was the fact that the plaintiff—not a girl, as the Attorney-General had called her, but a woman of mature age—had knocked at her mother's door at night violently for a long time, and, when it was not opened to her, had gone down stairs and unravelled the stocking which Mrs. Neave had knitted. Her explanation of this was that at the time her mother's mind had become so affected by sulphuric ether that she thought the unravelling of the stocking would bring her to book; but had the act been that of a rational person? Such an act as that of hissing at the nurse on the return of the latter to Mrs. Neave's house, had at any rate exposed the plaintiff to the suggestion that her mind had

been unhinged. She had admitted that she had thought of putting her mother into an asylum, but had been deterred from taking any steps in the matter because she thought it would be cruel. This was just before Mrs. Neave had written those letters to the plaintiff when she had been at the asylum which had been read during the course of the case—letters which were clearly those of a well-bred intelligent lady, written with a view of soothing and pleasing her daughter. Had she believed that her mother's mind had been affected by the sulphuric ether? The learned judge hoped that she had, or otherwise it would have been a monstrous thing for her to have entertained the idea of sending her mother to an asylum. But he would assume that she had believed it, though there had not been the very slightest foundation for it. He approached another matter with great reluctance—that was, the very severe attack which the Attorney-General had thought fit to make upon Mrs. Neave, and also by implication upon Major Neave. They might possibly have been mistaken in the cause to which they had attributed the intolerable misery which the plaintiff had brought upon those living in her mother's house, as this might have been due only to her violent temper and ill-regulated disposition. But what interest could they have had in sending her to an asylum except to do her good? It was clear that her brother had let her go there most unwillingly, and had taken her away from it at the earliest possible moment. It was not suggested that Major Neave could not have induced his mother to have forborne sending the plaintiff to the asylum at all, and therefore by implication he had been attacked as severely as his mother. Before the jury could condemn them, as the Attorney-General had invited them to do, they ought to consider what they would have done under the circumstances. Nor could it be fairly said that the authorities of the asylum had evinced any desire whatever to retain the plaintiff there for the purpose of getting gain from it. His lordship then called the attention of the jury more especially to the evidence given by Mr. Phillips, who, as he said, could have no possible interest in the case. He had satisfied himself that the plaintiff, both when at the asylum and in November, 1881, when she had gone to him at Whitehall, had been full of delusions. He had taken notes of what she had said to him

on the second occasion, which 'he had produced, and his evidence was worthy of the gravest consideration at the hands of the jury. His lordship then dealt with the question as to whether or not the defendant had been guilty of negligence, and on this point read passages from the judgment of Mr. Justice Crompton in the case of *Hall v. Semple* (3 F. and F. 356); among others this one: 'On the one hand it is of great importance that medical men should very carefully sign certificates of this kind, and that personal liberty should not be interfered with improperly by any abuse of the power which the law has intrusted to them; and, on the other hand, it is very important to the medical profession that if a person acts really *bona fide* under the authority of the Act by which these duties are assigned to him, he should not be made responsible for a mere error in judgment or mistake of facts. It is also very important in the interests of the public that persons who are really lunatics should be immediately taken care of. Very often it is a difficult and delicate matter to be decided upon, and we all know what lamentable mischief sometimes arises through lunatics not being put under restraint at the proper time. Again and again we see in the criminal courts what lamentable consequences ensue from even a few hours' delay. If the plaintiff's case was well founded, no doubt it would be a sad thing if there were no redress. And, on the other hand, it would be lamentable if, were no blame really attached to the medical man, he was to be ruined merely for having acted *bona fide* in the performance of the duty which the statute has imposed upon (or assigned to) him.' The simple question in the present case was whether or not the defendant had been guilty of culpable negligence in signing the certificate. If the jury were of opinion that there had been no proper examination by the defendant of the plaintiff's mental condition before he had signed it, the case would be clearly one for substantial damages. The questions for the jury would be—(1) Whether on July 12 and 13, 1881, the plaintiff had been of sound mind, and (2) whether, if she had been so, the defendant had been guilty of culpable negligence in certifying that she had not been. If they answered the first question in the negative, and the second in the affirmative, then they would have to assess the damages.—The foreman handed in the paper with the questions, from which it appeared that the jury answered both the questions in the negative.—Judgment was accordingly given for the defendant, but execution was stayed for fourteen days. If during that time the plaintiff lodged an appeal, then execution was further ordered to be stayed until that appeal had been disposed of by a Divisional Court.

The Legal News.

Vol. VIII. AUGUST 15, 1885. No. 33.

The report of the general council of the bar for the past year gives the statistics of legal examinations in the province for several years past. In 1882, of 64 candidates for practice 55 were admitted and 9 rejected. In 1883, 52 were admitted and 21 rejected; and in 1884, 59 were admitted and 27 rejected. In the same years the examinations for admission to study resulted as follows: In 1882, 45 admitted and 31 rejected; in 1883, 41 admitted and 15 rejected; and in 1884, 39 admitted and 14 rejected.

Lord Bacon conceded to judges a certain discretion in the enforcement of existing laws. "Let penal laws," he says, "if they have been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution." But laws enacted for the security of the people against the ravages of a loathsome disease can hardly fall into the category indicated by the Lord Chancellor. Here, if anywhere, the convenience of the individual must yield to the requirements of the community. "*Salus populi suprema lex.*" Those who, by supineness at the critical moment, fail to exert the salutary authority entrusted to them incur a fearful responsibility.

The Criminal Law Amendment Act, which has been so constantly referred to of late in the English despatches and which received the royal assent on the 14th of August, makes some important changes in the criminal law of England. The tenor of the Act, as indicated by the *Law Journal*, is as follows:—"It may be said of it generally that it makes procuration a crime; that it makes it an offence to procure sexual connection with women by means of false pretences or false representations; that it raises the age of felony committed on young children from twelve to thirteen, and the age of misdemeanour from thirteen to sixteen; that it creates

a felony in the occupier of premises allowing a girl under thirteen to be carnally known therein, and a misdemeanour in the case of a girl between thirteen and sixteen; that it raises the age of abduction for sexual purposes from sixteen to eighteen; that it makes a statutory offence of detaining a girl in a brothel against her will; that it allows a search warrant to be granted by magistrates at the instance of parents or guardians in case of girls detained against their will for immoral purposes, and of very young girls against the will of their guardians; and that it creates a new offence of gross indecency between male persons, and a new offence in respect of brothels in the landlord or landlord's agent. While thus dealing liberally with the substance of the law, it has some special provisions as to procedure. Convictions of the majority of the offences are not to take place except upon corroborative evidence. Upon a charge of defiling a girl under thirteen she may be examined, although she does not understand the nature of an oath, and persons charged under the Act, and their husbands or wives, may be competent but not compellable witnesses."

PRACTICAL HINTS IN THE PREPARATION OF BRIEFS.

It is, of course, impossible fully to go into this subject within the limits of a short paper. It is but practicable to outline some of the more material points. I purpose to give a few hints only concerning the preparation of briefs. Much of what may be said is equally applicable to oral arguments. Indeed, an oral argument is usually based upon the brief which it may, according to circumstances, either expand or abridge.

The first essential to either mode of presenting a cause to a court is a minute study and thorough understanding of the facts and the law of the particular case. Not some other case, but the case in hand. Cases presenting to superficial observation the same general features, are often found, upon more careful scrutiny, to contain elements or to be wanting in elements which make them essentially distinguishable. The same state of facts often give rise to different principles, depending

upon the character or relations of the parties to the controversy. A very common fault is found in the failure to take into consideration *all* the facts upon which the legal duty or liability arises. But perhaps the most difficult function of the lawyer is to determine which of the facts are essential and which are non-essential; to eliminate the latter and to show, against the possible contention of the opposing counsel, their immateriality. The facts of a given cause may be and often are numerous. But many, perhaps a majority of cases turn upon one or two controlling points. Study and careful discrimination are necessary to select from the mass of facts those that are controlling: to select from the storehouse of the law the legal principles which justly apply to the controlling facts. In the study of a cause, after the controlling facts are ascertained, I have found it to be a most useful general inquiry to make; *What is the intrinsic justice of this case?* If it is clear that right and justice are on my client's side, I can prognosticate with great confidence a favorable result. But if they are on his adversary's side, and I have to rely upon the provisions of an uninterpreted statute, or upon some reported case which I suppose to be in point, the reliance generally and I may add rightfully fails.

If the *right and justice* of a case are clear, the counsel may feel assured that, with rare exceptions, right and justice are coincident with the true principles of the law applicable to it. If a legal principle is asserted, which is subversive of justice, it is quite certain either that there is no such principle, or what is, perhaps, the more common error, the principle, though sound when rightly applied, is inapplicable to the case in hand.

The careful study of a cause such as I am insisting upon as being absolutely essential, will necessarily lead the counsel to form his theory of his cause, and so far as he may, the theory of his adversary. This done, the work of formulating the brief may be begun, and here the first step is the *statement of the case*.

Not only the first step, but the most important. Not only the most important, but it may perhaps surprise the legal reader to add *the most difficult*. As a result of large observation and experience, I feel obliged to say that comparatively few lawyers understand the

art of stating a cause to the court. Some have no plan at all. Some begin in the middle. Others fail to discriminate between what is essential and what is immaterial. Others are verbose and rambling. You here perceive the value of what is said above as to the necessity of a careful study of your cause, and the formation of your theory of it. The statement of the case consists in the regular and logical exposition of the material facts, and, where necessary, showing that other facts are immaterial. The importance of a concise but complete statement of a cause is found in the fact that perhaps nine cases out of ten are practically decided when the case is stated; and your case may be lost if you have omitted the controlling of even material facts in your presentation of it.

The late Mr. Justice Curtis of the Supreme Court of the United States was remarkable for his felicity and power of condensed but complete and accurate statements. His reported judgments on the Circuit and in the Supreme Court may be profitably studied, as examples of the mode of properly stating a cause, as well as for their legal learning, and as models of judicial style.

Having stated the facts of the cause, the next question is, *What is the law of the cause?*

And here the first impulse of the average lawyer is, "Is there any case in point?" If the lawyer proceeds carefully he will first inquire and make sure whether there is any constitutional provision, federal or state, applicable to the case stated. Next, whether there is any statutory provision applicable to it, and whether and how it has been judicially construed. Failing to find his case controlled either by constitutional provisions or statutes, his next inquiry should be what legal duty or liability arises on this state of facts—in other words, what are the true legal principles applicable thereto? To determine this, he naturally and properly has recourse to his books—Elementary Treatises and Reports. Text books of acknowledged merit may of course be used. There is, however, much difference in their value; too many are worthless and unreliable. A statement of the law by writers such as Sugden, Byles, Benjamin, Mr. Justice Lindley, Chancellor Kent, and some other authors

of recognized merit, carries with it a very strong presumption of its correctness; and often more force than the mere statement of the law in an isolated case in a book of reports. But the highest evidence of legal principles is, as we all know, to be found in the Reports, which not only state the principle but show its application.

The most common defect I have observed in the argument of causes next to faulty "statements" is the misuse of reported cases. No lawyer is justified in citing a case in his brief which he has not carefully read and studied. What does this mean? It means that without a careful reading and study of the case cited, it cannot be seen that it is applicable to the case in hand. Concerning the proper use of adjudged cases and their misuse in other respects, I may say something hereafter. But if the lawyer conscientiously pursues the course above indicated, viz., to cite no case upon his brief until he has read it so carefully that he could himself make an accurate syllabus of it, he will avoid a most prevalent and mischievous practice—the loose, careless and inconsiderate citation of cases. A citation of a case under a given proposition ought, unless distinctly otherwise stated, to be equivalent to an implied professional certificate that, in the writer's judgment, the case cited is an express authority in support of such proposition.—*Judge Dillon in Columbia Jurist.*

COUR DE POLICE.

MONTRÉAL, 27 juillet 1885.

B. A. T. DEMONTIGNY, Magistrat.

LA REINE V. TRANCHANT.

Libelle—Examen préliminaire—Témoins proposés par l'accusé—Devoir du Magistrat.

JUGÉ: *Que le Magistrat peut et doit, dans toute cause où l'on procède par voie d'acte d'accusation, prendre les dépositions de ceux qui ont eu connaissance des faits et circonstances de l'affaire, que ces témoins soient proposés par la poursuite ou la défense; que ce devoir du Magistrat est impératif dans les poursuites privées ainsi que dans les poursuites publiques.*

PER CURIAM. Le libelle contre les individus est défini par Archbold, Cr. Pldg. 857: "A

libel upon an individual is a malicious defamation of any person made public, either by printing, writing, signs or pictures, in order to provoke him to wrath, or to expose him to public hatred, contempt or ridicule."

Il faut donc pour constituer ce délit que la diffamation soit rendue publique.

Archbold, à la page 318, 4 ed. am. de 1853, dit: "To maintain the indictment, he must first prove publication; for unless the libel have been published, those who have composed, written, or printed it, are not punishable. But upon publication being proved, the prosecutor may proceed to give evidence against any of the defendants who may have composed, written, or printed the libel; for they are principals, and all may be included in the same indictment."

C'est l'opinion de tous les auteurs, entr'autres Roscoe, Criminal Evidence p. 654.

Le poursuivant avait donc à prouver que l'accusé avait publié, ou fait publier l'article incriminé dans le *Star*. Il l'a fait par des présomptions. Et nul doute que ces présomptions seraient suffisantes; mais la meilleure preuve n'a pas été offerte et le défendeur dit que le propriétaire du journal en question peut prouver que l'accusé n'a eu rien à faire avec cette publication.

Le magistrat peut-il ou doit-il entendre ce témoin?

La sec. 29 du ch. 30 de 32-33 Vict., qui est l'acte de procédure en matière d'enquête préliminaire, dit: "Dans tous les cas où une personne comparait ou est traduite devant un ou des juges de paix pour une offense poursuivable par voie d'acte d'accusation.... le ou les juges de paix, avant d'envoyer le prévenu en prison, ou de l'admettre à caution, recevront, en présence du prévenu (qui aura la liberté d'interroger les témoins à charge) les dépositions sous serment ou par affirmation, de ceux qui ont eu connaissance des faits et circonstances de l'affaire."

Le législateur fait donc une obligation en disant "recevront," au magistrat à l'enquête préliminaire de recevoir les dépositions de ceux qui ont eu connaissance des faits et circonstances de l'affaire.

C'est ainsi que les choses se font en Angleterre en vertu de la sec. 17 du ch. 42 de 11-12 Vict.: "When the witnesses are in attend-

ance, dit Harris, p. 313, the magistrate takes, in the presence of the accused (who is at liberty by himself or his counsel to put questions to any witness produced against him), the statement on oath or affirmation of those who know the facts of the case, and puts the same in writing."

Woolrych, traduit par Lanctot, p. 19, dit : "Le prisonnier peut alors amener des témoins qui doivent être examinés sous serment ; et peut-être est-il discrétionnaire chez le J. de P. de les entendre ou non, quoique les juges soient portés à croire que leur examen est plus obligatoire depuis le rappel de l'acte 7 Geo. 4, c. 64, sec. 2."

Lanctot, dans son livre du Magistrat, pose la question si l'accusé peut faire entendre des témoins, et il la résout dans l'affirmative.

Kerr, dans son livre "Magistrates Acts," n'en doute pas du tout, et il affirme la proposition en ces termes : "The justice is bound to examine all the parties who know the facts and circumstances of the case—(p. 79). Voyez *Regina v. Dease et Schultz*, Legal Directory p. 27."

Mais on dit que ce n'est qu'en matière de félonie que cette permission peut être accordée à l'accusé. La loi ne distingue pas, et la sec. 29 déjà citée dit : "Dans tous les cas où une personne comparait ou est traduite devant un des juges de paix pour une offense poursuivable par voie d'acte d'accusation." Or la procédure ici est par voie d'acte d'accusation puisqu'on procède à l'enquête préliminaire.

Je ne vois pas pourquoi l'accusé ne serait pas aussi protégé quand il est poursuivi par un individu au nom de la Reine que quand il est recherché par la Reine pour le public.

Et dans le cas de libelle surtout la jurisprudence comme la loi lui accorde plus de protection. Aussi dans la cause *Commonwealth v. Buckingham, 2 Wheeler's C.C. 198*, rapporté dans 2 Starkie on Slander, on a consacré cette théorie : "The defendant may rebut the presumption by evidence that the libel was sold contrary to his orders, or clandestinely, or that deceit or surprise was practised upon him, or that he was absent under circumstances which entirely negative any presumption of privity or connivance."

Notre statut lui-même, concernant le libelle,

donne cette permission à l'accusé de prouver que la publication d'un libelle a eu lieu sans son autorisation, son consentement ou sa connaissance. (S. 10 de 37 Vict., ch. 38).

Le magistrat ordonna en conséquence que le propriétaire du *Star* soit entendu.

F.-X. Archambault, avocat du plaignant.

Arthur Globensky, avocat de l'accusé.

(J. J. B.)

COUR D'APPEL DE RENNES.

Juin 1885.

DELLE X.... v. M. Z....

Séduction—Dommages-intérêts.

JUGÉ : *Que si la séduction ne peut, en principe, donner ouverture à une action en dommages-intérêts, il en est autrement lorsque la femme a été victime d'une violence morale, caractérisée par des manœuvres dolosives et des promesses fallacieuses qui ont égaré sa raison et surpris son consentement.*

Voici les faits qui ont été établis par les documents de la cause :

M. Z...., veuf et père de deux enfants, avait pris à son service Mlle X...., âgée de dix-huit ans. Après avoir, au mépris de ses devoirs, abusé de son autorité pour la séduire, il était parvenu à triompher de ses résistances en lui promettant de l'épouser. Mlle X.... étant devenue mère, Z.... a présenté lui-même le nouveau-né à la mairie, en déclarant qu'il s'en reconnaissait le père. Malgré la mort presque immédiate de cet enfant, il avait fait faire, deux mois après, les deux publications de mariage exigées par la loi. Bien qu'il n'eût rien à reprocher à sa fiancée, il viola ses engagements, pour contracter une union avantageuse.

Assigné en dommages, l'arrêt de première instance renvoya l'action.

Le tribunal de Rennes renversa ce jugement.—L'arrêt a déclaré que M. Z.... s'était rendu coupable d'une faute qui l'obligeait à réparer, dans la mesure du possible, le préjudice dont il était l'auteur, et vît la jurisprudence constante en ce sens, la cour, infirmant le jugement de première instance, a condamné le sieur Z.... à payer à la demoiselle X.... la somme de 1000 fr. à titre de dommages-intérêts.—(Rapport de M^{re} Albert, *Journal de Paris*).

(J. J. B.)

RECENT ONTARIO DECISIONS.

Railway—Barbed Wire Fence.—*Held*, that 46 Vict. ch. 18, s. 490, ss. 15, 16, seemed to sanction a barb wire fence, and empower municipalities to provide against injury resulting from it. Such a fence constructed by the defendants upon an ordinary country road along the line of their railway could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case having been passed respecting fences of the kind; and that the defendants were not, therefore, liable for the loss of the plaintiff's colt, which while following its dam, as the latter was being led by the plaintiff's servant, ran against the fence and received injuries resulting in its death. But, *held*, that if the doorways of shops and the boundaries of private residences, churches, and other buildings on the sidewalks of thoroughfares, and perhaps on all sidewalks, were so fenced, such fencing would be a nuisance. *Held*, also, that the colt in question, five weeks old following its dam, could not be said to be running at large, the universal custom of the country which ought to govern being for colts thus to follow the dam.—*Hillyard v. Grand Trunk Railway Co.* Q. B. Division.

Insurance—Title—Incumbrance—Representation.—Action on two policies of insurance on dwelling-house, barn, etc., and contents. On the face of the policies was a provision making the applications part of the policies. By the first statutory condition, if the owner misrepresented or omitted to communicate any circumstance material to be made known to the Company to enable them to judge of the risk, the insurance should be void so far as respects the property misrepresented. By the fourteenth statutory condition, "all fraud or false swearing in relation to any of the above particulars," vitiated the claim. The insured property had been conveyed by the plaintiff's father to the plaintiff, the consideration being natural love and affection, and was made subject to a condition requiring the son to maintain and support the father and also a brother. In the application the property was stated to be held in fee simple, and to be unincumbered, and this was sworn to in the proofs of loss.

Held, that the statement as to the property was a misrepresentation merely, and its materiality was a question for the jury; and in any case the misrepresentation would only apply to the building and not to the chattel property. The judge at the trial having directed a verdict to be entered for the defendants on the ground that the untrue statement of itself vitiated the policy, a new trial was ordered.—*Goring v. London Mutual Fire Ins. Co.* Common Pleas Division.

Vagrant Act.—The Vagrant Act, 32 and 33 Vict., ch. 28 (D.), declares certain persons or classes of persons to be vagrants, and subject to punishment on summary conviction, amongst others, "all common prostitutes or night-walkers wandering in the fields, public streets or highways, lanes, or places of public meeting, or gathering of people, not giving a satisfactory account of themselves, all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses not giving a satisfactory account of themselves."

Held, that the Act does not declare that being a prostitute, night-walker, keeper of a bawdy house, or frequenter thereof, makes a person a criminal liable to punishment as such; but only when such persons are found at such places under circumstances suggesting impropriety of purpose, and who, on request or demand, are unable to give a satisfactory account of themselves.—*Regina v. Arscott.* Common Pleas Division.

Building contract—Liquidated damages for delay.—Action for balance due under a building contract. Defence: that by the contract the plaintiff was to build the house and have the same completely finished and ready for the defendant's occupation by a named date "under a penalty of \$5 per day" to be paid by the plaintiff to the defendant for each and every day the work on said house remained unfinished after the said date, alleging that the work remained unfinished after the said date for some sixty days, making an amount of \$300 which defendant was entitled to deduct from the contract price. *Held*, on demurrer, defence good: that the \$5, though called a penalty, were in fact liquidated damages.—*Chatterton v. Crothers*, Common Pleas Division;

Slander—Justification—Mitigation of damages.—In an action of slander the statement of claim set out that the plaintiff was a solicitor, and as such was retained and instructed by one S. to let certain farming lands and collect the rents and profits thereof for and on behalf of said S., and the defendant falsely and maliciously spoke and published of the plaintiff, that he, S., "could not get anything from the plaintiff who has been collecting the rent for S.; he had never made any return to S.; he has used the money himself; he has robbed him out of the whole affair, and the only thing he could do would be to send him to the penitentiary," meaning that the plaintiff was guilty of fraudulent and felonious conduct in his said business. In the statement of defence the defendant denied all the allegations contained in the statement of claim, and in the second paragraph said that if the plaintiff established that the defendant spoke and published of the plaintiff the words charged in any of them, the defendant in mitigation of damages said that S., defendant's brother-in-law, about fifteen years ago left this province and went to British Columbia, leaving the plaintiff in full charge and control of all his real and personal estate herein; but never had been able to get any satisfactory statement of his affairs from him; that in July last, defendant's sister, wife of S., returned to this province with instructions from S. to get such statement from plaintiff and effect a settlement with him; that for some eight weeks she endeavored constantly to get such statement from the plaintiff, but without avail; and therefore S. for such purpose was compelled to return to this province; that he discovered that plaintiff had received a sum of \$600 from a tenant of S., for which plaintiff was unable to account, and had also received other sums of money which he had converted to his own use, and that S. had never been able to obtain from the plaintiff payment of the said sums of money so received by him.

Held, on demurrer to the second paragraph of the statement of defence, that it was good; that it set out facts which amounted to a justification, and if the defendant being so entitled to plead such facts as justification, chooses to restrict their effect to the mitiga-

tion of damages he may do so.—*Wilson v. Wood*, Common Pleas Division.

Minister of Agriculture and Commissioner of Patents—Jurisdiction—Examination of witnesses.—*Held*, that the Minister of Agriculture as commissioner of patents has jurisdiction, under S. 28, Patent Act of 1872, to decide any disputes as to whether a patent has become void for the non-observance or violation of the provisions of that section; and, *semble*, a private person has the right to question the validity of a patent, and that the intervention of the attorney general is not necessary. Also, that the Minister's duties are ministerial and not judicial, and therefore his decision cannot be reviewed in a court of law.

Held, also, that the Minister is not required to examine witnesses under oath or to grant summons for the attendance of witnesses before him, as the statute does not require it.

Quare, whether, if the Minister act judicially, the Provincial Courts have jurisdiction to question his decision, it being that of a court created by the Dominion Parliament.—*Re Bell Telephone Co.* Common Pleas Division.

Libel—Publication.—In an action of libel the alleged libel consisted of an account delivered by the defendant to the plaintiff. The account was headed "Mr. Joseph Jackson to Wm. Staley, Dr." A number of items were given with the dates, and amongst them the following: "Stole hay during winter, \$4; and stole one hatchet hammer, \$1.50." The plaintiff had been a servant of the defendant, and after a year's service, in consequence of a disagreement, left and asked for an account of amount due him for wages, when the defendant sent the above account (which overbalanced the claim for wages) in an envelope by his (plaintiff's) then employer M., who delivered it at the plaintiff's house, leaving it on the table between the plaintiff and his wife while at supper. The wife took it up and taking the account out of the envelope read it to the husband, who could neither read nor write. It did not appear that M. read the account or took it out of the envelope, and he was not called as a witness by plaintiff, or that the defendant knew that the plaintiff could not read. The only evidence suggested of such

knowledge was that defendant's wife had signed the contract for plaintiff's service with defendant, but it did not appear that defendant's attention had been called to the fact, or that he knew that the signature was in the wife's handwriting, or that plaintiff could not read. The plaintiff brought an action for his wages and was successful, and then brought an action for libel.

Held, that there was no evidence of publication, and the action failed.—*Jackson v. Staley*, Common Pleas Division.

LAWYERS IN THE NEW ADMINISTRATION.

Sir Hardinge Giffard, Lord High Chancellor of Great Britain, of whom a biographical account was published last week, has chosen the title of Lord Halsbury.

Sir Stafford Henry Northcote (Earl of Idlesleigh), G.C.B., First Lord of the Treasury, was called to the bar at the Inner Temple in 1847, and has been a member of the House of Commons for thirty years. He held the office of President of the Board of Trade in 1866-7, was Secretary of State for India in 1867-8, and Chancellor of the Exchequer from 1874 till 1880. He was elected Lord Rector of Edinburgh University in 1883, and is the eldest son of the late Mr. Henry Stafford Northcote. He was formerly Legal Secretary to the Board of Trade and Financial Secretary to the Treasury. Sir Stafford married, in 1843, Cecilia Frances (a member of the Imperial Order of the Crown of India), daughter of Mr. Thomas Farrer, of Lincoln's Inn.

The Right Hon. Gathorne Gathorne-Hardy, Viscount Cranbrook, G.C.S.I., D.C.L., Lord President of the Council, was called to the Bar at the Inner Temple in 1840, and became a bencher of that Inn in 1868. He was Under-Secretary for the Home Department in 1858-9, President of the Poor Law Board in 1866-7, Home Secretary in 1867-8, Secretary of State for War from 1874 to 1878, and Secretary of State for India from 1878 till 1880. He is a magistrate for Kent, and late chairman of the West Kent Quarter Sessions.

The Right Hon. Sir Richard Assheton Cross, G.C.B., who has been re-appointed Home Secretary, a position which he occu-

pled from 1874 till 1880, was called to the Bar at the Inner Temple, of which he became a bencher. Sir Richard Cross is a magistrate for Cheshire, Lancashire, and late chairman of the Lancashire Quarter Sessions.

The Right Hon. Edward Gibson, LL.D., who is to be raised to the peerage on his appointment as Lord Chancellor of Ireland, was born in 1837, graduated at Trinity College, Dublin, and was called to the Irish bar in 1860. He was made a Queen's Counsel in 1872, and elected a Bencher of King's Inn, Dublin, in 1877. Mr. Gibson has been M.P. for Dublin University since 1875, and held the post of Attorney-General for Ireland from 1877 till 1880. Mr. Gibson, who is a magistrate for the county of Meath, married, in 1868, Frances, daughter of Mr. Henry Colles, barrister-at-law.

Mr. Richard Everard Webster, Q.C., Attorney-General, is the second son of the late Thomas Webster, Q.C., a bencher of Lincoln's Inn. He was born December 22, 1842, and was educated at King's College School, Charterhouse, and Trinity College, Cambridge, of which he is M.A., and where he was scholar, thirty-fifth wrangler, and third class in classics. He was called to the Bar at Lincoln's Inn in Easter Term, 1868, and goes the South-Eastern Circuit. He was 'tubman' of the Court of Exchequer from 1872 to 1874, and 'postman' from 1874 to 1878. He was created a Q.C. in Easter Term, 1878, a bencher Michaelmas 1881. In Aug., 1872, he married Louisa Maria, only daughter of William Charles Calthrop, Esq., of Withern, Lincolnshire.

Mr. John Eldon Gorst, Q.C., M.P. for Chatham, who has been appointed Solicitor-General, is a son of the late Mr. C. E. Lowndes, of Preston, Lancashire, and he assumed the name of Gorst in lieu of Lowndes in 1853. He was born in May, 1835, and was educated at St. John's College, Cambridge, where he graduated B.A. in 1857 and M.A. 1860. He was called to the Bar at the Inner Temple in 1865, when he joined the Northern Circuit, and was made a Queen's Counsel in 1875. He sat for Cambridge from 1866 to 1868, and was first returned for Chatham in 1875. His first appearance in any case of public note was at the inquiry held some

years ago respecting the death of Mr. Bravo, in what is generally known as the Balham mystery, when he represented the Crown at the inquiry.

Sir Henry Thurstan Holland, Financial Secretary to the Treasury, is the eldest son of the late Sir Henry Holland, M.D. He was called to the Bar at the Inner Temple in 1849, and is a bencher of his Inn. He was legal adviser to the Colonial Office from 1867 till 1870, Assistant Under-Secretary for the Colonies from 1870 till 1874, and has been M.P. for Midhurst from the latter date.

Mr. Aretas Akers-Douglas, Patronage Secretary to the Treasury, is the eldest son of the Rev. Aretas Akers, of Malling Abbey, Kent, and was born in 1851. He was educated at Eton and at University College, Oxford, and is a barrister of the Inner Temple. He was elected M.P. for East Kent in 1880. Mr. Akers assumed the additional name of Douglas, under the will of his kinsman Mr. Alexander Douglas.

Mr. Charles Dalrymple, Junior Lord of the Treasury, is the second son of the late Sir Charles Dalrymple Ferguson, and was born in 1839. He assumed in 1849 the name of Dalrymple, on succeeding to the estates of his great-grandfather, Lord Hailes, of Newhailes, Midlothian. Mr. Dalrymple is a barrister of Lincoln's Inn and a magistrate for Haddingtonshire, Midlothian, and Ayrshire. Mr. Dalrymple was M.P. for Buteshire from 1868 till 1880, and was re-elected in July of the latter year in place of Mr. Russell, whose election was voided.

The Hon. Edward Stanhope, Vice-President of the Council, is the second son of Philip, fifth Earl Stanhope, and was born in 1840. He became a barrister of the Inner Temple in 1865, Secretary of the Board of Trade from 1875 till 1878, and Under-Secretary of State for India from the latter date till the last dissolution. He was first elected to Parliament as member for Mid-Lincolnshire in 1874.

The Right Hon. Robert Bourke, who has been re-appointed Under-Secretary for Foreign Affairs—a post which he held from 1874 till 1880—is the third son of the Fifth Earl of Mayo. He was born in 1827, and was called to the Bar at the Inner Temple in

1852, and has sat for Lynn Regis since 1868. Mr. Bourke is a magistrate and deputy-lieutenant for Haddingtonshire. He was sworn a Privy Councillor in 1880.

Baron Henry de Worms, F.R.A.S., Parliamentary Secretary to the Board of Trade, is the youngest son of the late Baron de Worms. He was born in 1840. He was educated at King's College, London; was called to the Bar at the Inner Temple in 1863, and joined the Home Circuit. He is a magistrate for Middlesex, and has sat for Greenwich since the last general election.

Mr. Ellis Ashmead-Bartlett, Civil Lord of the Admiralty, is the eldest son of the late Mr. Ellis Bartlett, of Plymouth. He was born in 1848, and was called to the Bar at the Inner Temple in 1877, and was for some time one of her Majesty's inspectors of schools. He has sat in Parliament as member for Eye since 1880.

Mr. Charles Beilby Stuart-Wortley, Under-Secretary of State for the Home Department, is the second son of the late Right Hon. James Archibald Stuart-Wortley, Q.C., M.P., sometime recorder of London and Solicitor-General. He was born in 1851, and was called to the Bar at the Inner Temple in 1876, and is a member of the North-Eastern Circuit. From February, 1879, till March, 1880, he acted as secretary to the Royal Commission on the Sale, &c., of Benefices. Mr. Stuart-Wortley has sat for Sheffield since the last general election.—*Law Journal* (London).

GENERAL NOTES.

CRIMINAL LAW BILL.—A County Justice's Clerk writes as follows to the *Times* in regard to the Criminal Law Amendment Bill: Before it is too late I should like to ask the following questions: 1. Is it seriously intended that under the forthcoming Act a stout young woman of 151 years may accompany, perhaps inveigle, a foolish lad, say, twelve months her junior, to a casual immorality, and that the result to him may be a commitment for trial and to her absolute impunity? 2. Suppose, on the hearing of an affiliation summons, it "transpires" (as they call it) that the complainant was under sixteen at the time when the cause arose, will it be the duty of the justices to commit the defendant for trial for an offence against a charge for which consent cannot be pleaded? 3. Will the clergyman who marries a couple, the bride being under sixteen, incur any legal responsibility? A stalwart old blacksmith in my neighbourhood was born in lawful wedlock, seventy-two years ago, when the united ages of his parents were under thirty-one, that of his mother being little over fourteen."

The Legal News.

VOL. VIII. AUGUST 22, 1885. No. 34.

Reference was made on p. 233 to the fact that the appeal to the Privy Council in the case of *McGibbon v. Abbott* had been dismissed. The observations of their lordships will be found in the report in the present issue. It is decided, in the first place, that the will in question, as was held by our Court of Queen's Bench, must be construed in accordance with the law of this Province, the will having been executed here by a person domiciled in the Province, and relating to an estate situated within the Province. This preliminary question being settled, the Court found that it was also rightly decided, where power was given to divide by will among the testator's children, that the division among four, to the total exclusion of the fifth child, was a valid exercise of the power. At the time the will was made, such a disposition would not have been valid under English law. But the English law, as has been observed, was held not to apply; and even in England the law has since been changed by Act of Parliament, and is now the same as our own upon this point.

A little more than a year ago, Chief Justice Coleridge, in passing sentence in the Yates case (7 Leg. News, 137), made some rather severe remarks upon society journalism. It may be suspected that there is a spice of malignity in the perseverance with which journals of the class censured have since pursued his lordship. First, in connection with his daughter's engagement and the libel suits growing out of it, the Chief Justice was not spared. And more recently, on the occasion of his marriage (Aug. 13) to Miss Lawford, it has been rumored that the ceremony was only forced by a threat of an action for breach of promise, a cruel and malicious report to which the friends of the lady have hastened to give an emphatic contradiction.

The venerable anecdote of the testator who wished his worst enemy no more cruel fate

than to find favour with his widow, has become a reality in a case now before the courts. An eccentric French physician of St. Maude had lived for years the life of a hermit. At his death the heirs-at-law put in an appearance expecting to inherit, but were confronted by the following will:—"January 8, 1882. This is my will and testament. At the present moment I consider myself bodily healthy, but cannot swear that I am so in mind. Such ridiculous presumption I bequeath to others. My fortune amounts to 70,000 francs. How many hypocritical tears might I have purchased for such a sum! I intended at first to devote these 70,000 francs to a beneficent object; but I asked myself, what would be the use of this? The only benefactors of mankind are war and cholera. Besides this, I am under great obligations to my dear wife, Célestine Mélanie, of whose whereabouts I have not the slightest idea. She once did me a great kindness. She left me one beautiful morning and I have never heard of her since then. With the most heartfelt thankfulness I appoint her my heir-at-law, but subject to the following condition—that she marry again immediately, so that at least there may be one man who will deeply deplore my death!" The heirs at law dispute the will on the ground that the testator was of unsound mind.

The English Criminal Law Amendment Act, 1885, section 4, provides that the personation of a husband shall amount to rape. Mr. Justice Stephen and Mr. Bishop have been of opinion that the act in question was not rape. The later decisions were opposed to this view. See *Reg. v. Dec*, p. 29 of this volume.

The latest number of the official statistical reports on the city of Paris states that during the month of January the number of divorces pronounced by the Maires of the city was 20; in February the number rose to 47, and in March to 167. In all these cases except three there had been a previous judicial separation *a mensa et thoro*. In 157 cases the wife was the petitioner; in 74 it was the husband. As to position, in 105 cases the parties were manufacturers or engaged in trade; 20 were officials; 36 belonged to a liberal profession; 32 were working people; the rest are undescribed.

SUPERIOR COURT.—MONTREAL***Malicious prosecution — Probable cause.—**

Held :—Where a person was discovered cutting and removing trees from the land of the defendant, and the excuse given, viz, that he had received permission to remove dead trees from the land of the adjoining proprietor, and that his men had unwittingly crossed the boundary line, was untrue, as he had not received such permission, that there was probable cause for his arrest for trespass.—*Wiseman v. McCulloch*, Loranger, J., Feb. 29, 1884 (confirmed in Review).

Caution solidaire—Droit de la caution contre le débiteur principal—Terme—Louage—Discussion.—Jugé :—1o. Que la caution solidaire du consentement du principal obligé peut, avant comme après l'échéance de la dette, sans avoir payé le créancier, soit que celui-ci ait donné terme ou non au débiteur principal, poursuivre ce dernier s'il devient insolvable, en déconfiture, ou, dans un cas de louage, s'il enlève des lieux loués les meubles affectés au loyer.

2o. Que dans le cas ci-dessus, si la caution solidaire ne prend aucune action contre le débiteur principal, elle ne peut, après avoir été poursuivi conjointement et solidairement par le créancier, opposer à ce dernier l'exception de discussion.—*Laurent v. Puquin et al.*, Papineau, J., 14 mai 1880.

Capias — Affidavit — Province de Québec et Province du Canada.—Jugé :—Qu'un défendeur arrêté en vertu d'un *capias* émané sur un affidavit qui allègue que le défendeur "est sur le point de quitter immédiatement la province de Québec, etc.," sera mis en liberté sur requête préliminaire comme ayant été arrêté irrégulièrement et illégalement, l'affidavit étant insuffisant en autant qu'il aurait dû mentionner la "province de Canada" au lieu de la "province de Québec."—*Mauray v. Durand*, Johnson, J., 10 janvier 1882.

Compensation—Créance ni claire ni liquide—Dommages—Acte authentique.—Jugé :—Qu'une créance résultant de dommages ni clairs ni liquides ne peut être offerte, par exception péremptoire, en compensation à une action

d'un vendeur réclamant la balance d'un prix de vente d'un immeuble par acte authentique, alors même que ces dommages résultent de la violation par le vendeur des conditions du dit acte de vente.—*Gagnon v. Gaudry et vir*, Mathieu, J., 13 mai 1885.

Cité de Montréal—Hommes de police—Arrestation illégale—Responsabilité.—Jugé :—1o. Que la cité de Montréal est responsable des actes de ses employés faits dans l'exécution de leur charge, ces derniers étant alors censés agir comme agents autorisés de la dite cité ; qu'en conséquence, elle est responsable des fausses arrestations faites par ses hommes de police.

2o. Que lorsque la cité de Montréal envoie ses hommes de police garder la paix publique à quelque endroit, et qu'elle place ces hommes sous les ordres d'une personne quelconque qui n'est pas à son emploi, cette délégation de pouvoirs n'empêche pas sa responsabilité.

3o. Que les hommes de police qui font une fausse arrestation sont aussi personnellement responsables, et ne peuvent être excusés par le fait qu'ils ont reçu d'une personne, autorisée ou non, l'ordre de faire l'arrestation.—*Laviolette v. Thomas et al.*, Jetté, J., 8 juillet 1881.

Action qui tam—Société—Enregistrement subséquent à l'action.—Jugé :—Qu'une personne qui fait un commerce en société et qui néglige de faire la déclaration requise par l'article 981 C. C., ne peut se soustraire à l'action pénale en établissant que dès avant l'institution de l'action elle avait enregistré la dite déclaration.—*Jeanotte dit Bellehumeur v. Burns*, Mathieu, J., 25 juin 1885.

Notaire—Responsabilité—Dommages.—Jugé :—1o. Qu'un notaire, dans la rédaction de ses actes, est responsable des vices de forme soit extrinsèques ou intrinsèques, et pourra être condamné à payer des dommages s'il y insère des clauses illégales qui sont la cause de l'annulation de l'acte par les tribunaux.

2o. Qu'il est de jurisprudence que ces dommages sont accordés plutôt comme peine que comme indemnité et que la tribunal peut les mitiger suivant les circonstances.—*Dupuis v. Rieuord*, Jetté, J., 5 juin 1885.

* To appear in full in Montreal Law Reports, 1 S.C.

Demande incidente—Libellé—Exception à la forme. — *Jugé* : — Qu'une demande incidente est suffisamment libellée, lorsque faite par le demandeur immédiatement après sa réponse spéciale au plaider, elle ne mentionne pas les raisons sur lesquelles elle est basée, mais réfère généralement à la dite réponse spéciale. — *Laflamme v. Mail Printing Co.*, Mathieu, J., 22 juin 1885.

Vente à réméré—Délai convenu—Avis—Mise en demeure—Impenses. — *Jugé* : — Que dans le cas d'une vente à réméré, lorsque le délai pour l'exercice du droit de réméré ne doit commencer à courir qu'à partir de l'achèvement par l'acheteur de certaines améliorations sur la propriété vendue, ce dernier est tenu de donner avis au vendeur lorsque les travaux communs sont terminés, et le délai ne compte que de cet avis. — *Fournier v. Leger, Jetté, J.*, 20 juin 1885.

Vente—Mandat—Responsabilité du mandataire—Billets. — *Jugé* : — 10. Qu'un mandataire qui achète pour son mandant sans déclarer sa qualité est responsable personnellement.

20. Que lorsque le mandant fait affaire sous le nom du mandataire, le fait que ce dernier, après avoir acheté, aurait signé des billets du nom de la société, et les aurait donnés au vendeur en paiement, n'est pas une déclaration suffisante de sa qualité pour dégager sa responsabilité personnelle. — *Pratte v. Maurice et al.*, Mathieu, J., 25 juin 1885.

Saisie-arrêt—Société commerciale — Déclaration de tiers-saisi—Fonds social. — *Jugé* : — Qu'un tiers-saisi, membre d'une société commerciale, et qui déclare pour elle que le défendeur a une part dans la dite société, peut être forcé de déclarer quel était lors de la signification de la saisie-arrêt le fonds capital de la dite société commerciale dont le défendeur fait partie. — *Laframboise v. Rolland, Jetté, J.*, 7 janvier 1885.

Société commerciale—Saisie-arrêt—Part d'un des associés—Argent payé après la saisie-arrêt. — *Jugé* : — Que l'on peut saisir par saisie-arrêt la part ou l'intérêt d'un associé dans une société commerciale, et que les associés seront condamnés personnellement à payer au demandeur-saisissant, toute somme d'argent

qu'ils auront payées à leur co-associé, dont la part ou l'intérêt aura été ainsi saisi, depuis la signification du bref de saisie-arrêt. — *Laframboise v. Rolland, Mathieu, J.*, 25 avril 1885.

PRIVY COUNCIL.

LONDON, July 18, 1885.

Coram LORD WATSON, LORD MONCKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD COUCH.

McGIBBON es qual. (plff. below), Appellant, and ABBOTT et al. es qual. (defts. below), Respondents.

Will—Power to divide among children—Exercise of power—Exclusion of one of the children.

HELD : — 1. *That a will executed in the Province of Quebec by a person domiciled therein, with reference to a portion of an estate situate in the Province, must be interpreted according to the laws of the Province, and not according to English law, though the will be in the English language and be couched in English legal phraseology.*

2. *Where an estate was devised to A. in trust, with power to A. to divide the capital among his children at his death in such proportion as he should appoint by his will, that a division by will among four of the children to the entire exclusion of the fifth, was a valid exercise of the power by A.*

The appeal was from a decision of the Court of Queen's Bench, Montreal, (reported in 7 Leg. News, 179), reversing a judgment of the Superior Court, Montreal (reported in 5 Leg. News, 431).

PERR CURIAM. This is an appeal from a decision of the Court of Queen's Bench for Lower Canada, in the Province of Quebec, which reversed a decision of the Superior Court in that province in favour of the plaintiff, who is now the appellant. He sued in the character of tutor *aux biens* of Humphrey Gordon Eversley Macrae, a minor, whom it will be convenient for the purpose of this judgment to treat as the plaintiff.

It appears that the late William Macrae, who was domiciled in Lower Canada, executed his last will at Montreal on the 3rd March 1868, in the English language.

The twelfth clause of the will was in the following words:—

"I give and bequeath unto my executors herein-after named for the use, benefit, and behalf of the children issue of the present or any future marriage of my son John Octavius Macrae, one-third of the residue and remainder of my estate and succession, to have and to hold the same upon trust; firstly, to invest the proceeds thereof in such securities as to them shall seem sufficient, and from time to time to remove and re-invest the same, and during the life of my said son, John Octavius Macrae, to pay the rents and revenues derived therefrom, to my said son, for his maintenance and support, and for the maintenance and support of his family; and secondly, upon the death of the said John Octavius Macrae, then the capital thereof, to his children in such proportion as my said son shall decide by his last will and testament, but in default of such decision, then share and share alike as their absolute property for ever; And I hereby will and ordain that my said son, John Octavius Macrae, shall have the right to receive the said revenues and profits for his maintenance as aforesaid, without their being subject to seizure for any debts created, or due, or payable by him, but shall be deemed and are hereby declared to have been given as an alimentary provision for his support, and that of his family, and *insaisissables*."

It will be convenient in this judgment to call the father "William" and the son "John." John was twice married, first in 1859, and secondly on the 20th November 1879. He died on the 12th May 1881, leaving four children the issue of his first marriage, viz, Lucy Caroline Macrae, now of age and one of the respondents in this case, John Ogilvy Macrae, Ada Beatrice Macrae, Catherine Alice Lennox Macrae, and Humphrey Gordon Eversley Macrae, the plaintiff, the issue of the second marriage, who was born on the 25th January, 1881, and is the appellant.

John, by his will dated the 5th April, 1880, directed and appointed that his son John Ogilvy Macrae and his three daughters, Lucy Caroline Macrae, Ada Beatrice Macrae, and Catherine Alice Lennox Macrae, should

be entitled equally, share and share alike, to the trust fund over which he had a power of appointment under his father's will; and by a subsequent provision of his will he bequeathed to his second wife the usufruct of all his property beyond the trust fund and the amount comprised in the settlement made on his first marriage, and to all of his children, including any who might be born after his second marriage, the capital of such other property, share and share alike.

It is evident that the intention of William was to tie up the capital of the share of his son John for the benefit of John's children as a class after his death. William, when he made his will, could not foresee what children John might have at the time of his death, or what might be their respective wants or requirements. He did not, therefore, attempt to specify in what proportion the capital should be divided, but he left that to the decision of his son, who would naturally be better acquainted with the circumstances of his own children. For example, John, during his lifetime, might make advances to some of his children, as it appears from another part of the will the testator himself had done with regard to his own sons George and John, and to his daughter Catherine, and not to others. Some of the children might be otherwise amply provided for, and might need no portion of the property left by their grandfather. It is contended, however, and was contended in the Courts below, that John was bound to give some share, however small, to each of his children, and that, according to the intentions of William as expressed by his will, in default of his doing so, all the children were entitled under it to take in equal shares.

The case was heard in the first instance in the Superior Court, when Mr. Justice Torrance decided in accordance with that view of the case.

On appeal to the Court of Queen's Bench, that Court, consisting of Chief Justice Dorion and four other Judges, reversed the decision of the Superior Court, and unanimously held that John had not only the right to apportion the capital between all his children, as well those of his then existing marriage as

those of any future marriage, but also the right to dispose of the property in favour of one or more of his children to the exclusion of the others, as he had done by will. From that judgment the plaintiff has appealed to Her Majesty in Council, for the following amongst other reasons:—

1. By the law of Lower Canada the Court is bound to give effect to the intention of the testator as evidenced by the whole will. *Martin v. Lee*, 14 Moore, P.C.C., 142.

2. That in the case of a will in the English language and couched in English legal phraseology, it was proper for the Courts of Lower Canada, in accordance with the case of *Martin v. Lee*, to have regard to the meaning and effect of that phraseology in the English language and law at the date of the will, in order to arrive at the intention of the testator.

3. That at the date of the execution of the will and down to and at the date of the death of the testator, the language of the said will would by the law of England, as it then stood, have given no right to John Octavius Macrae to exclude any of his children, but only to direct the proportions in which they would share.

4. That it appears from the will to have been the intention of the testator to benefit all his said grandchildren, and to give their father a power only to apportion but not to exclude.

5. That there is nothing in the law of Lower Canada opposed to this construction or to this intention.

The reasons of Mr. Justice Ramsay for his judgment in the Court of Appeal are set out in the supplemental record, and it appears from a letter from the Clerk of Appeals at Montreal to the Registrar of the Privy Council that Mr. Justice Ramsay rendered the unanimous judgment of the Court of Appeal, and that the other Judges have no notes, and have not sent any reasons for their concurrence in the judgment.

As to the first reason for the appeal to Her Majesty in Council, there can be no doubt that, according to the law of Lower Canada as well as according to the law of England, "the paramount duty of the Courts" (to use the words of Lord Justice Turner in the case

of *Martin v. Lee*, 14 Moore's Privy Council Cases, 153) "is to ascertain and give effect to the intention of a testator to be collected from the whole will, and not from any particular word or expression which may be contained in it." But it is not their duty, by adhering to the strict letter of a will, so to construe general words as in the absence of clear and unambiguous language to impute to a testator an unreasonable intention.

The doctrine of the English Courts of Equity as to illusory or unsubstantial appointments under a power is not, and never was, any part of the old French law or of the law of Lower Canada, nor is it included in any of the Articles of Chapter 4 of the Civil Code of Canada, relating to substitutions.

The question whether John could exclude any one of his children from a share must, in their Lordships' opinion, be decided according to the law of Lower Canada, and not according to the 'English law.' They do not understand the case of *Martin v. Lee* as deciding that a will executed in Lower Canada by a person domiciled in Lower Canada, if written in English, must be interpreted with regard either to moveable or immoveable property in Lower Canada according to the rules of English law, and have the same effect given to the phraseology as if that phraseology had been contained in a will executed in England by a person domiciled in England, or relating to land or other property in England. All that they understand that case to decide is that the word "children," used as it was in the will then to be interpreted, was not intended to have the more extensive meaning which may sometimes be given to the word "*enfants*" in the old French law. Lord Justice Turner, at p. 154, said: "The true question therefore in this case is not whether the word '*enfants*' may include grandchildren and even more remote descendants, but whether upon the true construction of this will it was intended to include them." See also the remarks at pp. 154 and 155.

It could never have been intended by their Lordships to lay down a rule of construction which might render it necessary to apply the rule in Shelley's case to a conveyance or devise written in the English language of lands

in Lower Canada to a man for life, with a substitution in favor of his heirs upon his death.

The question to be considered is whether, according to the law of Lower Canada, the gift in the will of William, by the words, "and, secondly, upon the death of the said John Octavius Macrae, the capital thereof to his children in such proportion as my son shall decide by his last will and testament," contained an exclusive or non-exclusive power. It may be said that, according to the words taken in their strict grammatical sense, each child was entitled to a share; but it is to be borne in mind that, as the old English rule of equity as to illusory appointments was not in force in Lower Canada, John, even if the power is to be construed as non-exclusive, might have given a share of one cent each to four of the children, and the whole of the remainder to the other. In other words, that \$100,000, the amount at which the property is valued by the plaintiff, *minus* four cents, might have been given to one of the children, and one cent, or a share in the proportion of one to ten millions, might have been given to each of the others.

It is to be observed that at the date of his will John had only the four children, amongst whom he thereby decided that the property charged should be divided. His decision at the time was quite in accordance with the will of his father, whatever construction is to be put upon it. He was not bound at that time to make by general words provision for a child who might be afterwards born. He was not bound to make his decision *uno flatu* (see *Cunningham v. Anstruther*, 2 Law Reports, Scotch and Divorce Appeals, p. 223). He might have revoked the will and made a new will, or he might have amended it by a codicil; and all doubt as to the validity of the will which was made before the birth of the plaintiff would have been removed if John had executed a codicil amending his will by giving one cent to the plaintiff, and the remainder to the four children named in the will.

William, if he had pleased, might have provided by express words that each child of John should have a share, and that no

share should be less than a certain amount, but he was not prepared to fix the amount of the shares. To hold that when he left to his son to fix the proportion he intended to render it compulsory upon him to give each child a share, though it should only be in the proportion of one to ten millions, would be to impute to him a most unreasonable intention. To do so would violate the rule of interpretation, *Qui hæret in litera hæret in cortice.*"

In England, Lord Alvanley, in the case of *Kemp v. Kemp* (5 Ves. Jun., 861), in holding a power to be non-exclusive upon finding a current of authorities against the words being construed as giving an exclusive power, observed: "My inclination is strong to support the execution of the power if I could consistently with the rules I find established;" and on referring to the case of *Burrell v. Burrell*, in which a testator gave all his real and personal estate to his wife, to the end that she "might give his children such fortunes as she should think proper," remarked: "Lord Camden, as I conceive, was of opinion that these words were so ample that if she thought fit to give nothing to one she might so execute the power. I am willing to subscribe to that opinion of Lord Camden upon such a doubtful question, being perfectly satisfied that in setting aside these appointments, by criticising the words 'to and amongst,' &c., and the rule as to illusory shares, the Court goes against the intention. I must therefore think that, under the words of that will, Lord Camden thought that the wife might have given the whole to one child, and had a right to exclude any who, in her opinion, did not want it." In the case then before him, Lord Alvanley held that the power was non-exclusive, but at the conclusion of his judgment, having given his reasons at length, he added: "For these reasons, but with less satisfaction than I have had in any other judgment that I have given, being satisfied that the person creating the power meant a much larger power than I can hold the person executing it had, I must declare the appointment void."

In Sugden on Powers it is said, "In many cases an exclusive appointment may be

"authorized by the apparent intention of the donor, although no words of exclusion are expressly used. Thus, he says, in *Bovil v. Rich*, 1 Chan. Cases, 309, the testator gave all the rest of his estate to A B in trust, "to give my children and grandchildren according to their demerits." A B gave the estate to one, excluding the rest. Lord Nottingham refused to set aside the appointment, as the children were to come in by the act of the devisee, and he was to give or distribute according to their demerits, therefore he was to judge." So in the present case John was charged with the fiduciary substitution and was to decide.

It was contended in the argument at the bar that John could not properly decide with reference to the plaintiff without considering his case, and that as his will was executed before the plaintiff was born he must have decided without considering. This is not so. He had the power to revoke or alter his will, and if he had thought that the plaintiff ought to have a substantially proportionate share, or even a nominal share, he could have decided in his favour by a codicil. In Domat's Civil Law, Part 2, Book 5, para. 3877, it is said, and with very good reason, "If he who was charged with a fiduciary bequest or substitution at the time of his death in favour of some one of his children whom he should think fit to choose, has given in his lifetime, to one of his children, the things which were subject to the fiduciary trust, this donation would be in the place of an election if the same were not revoked. For although the liberty of this choice ought to last until the time of the death of the person charged with the fiduciary substitution, and it was for the interests of all the children that the said donation should not destroy the said liberty, yet it would be sufficient that the donee had been made choice of, and that the said choice had not been revoked; seeing the choice would be confirmed by the will of him who, having it in his power to make another choice, had not done so. So it would be the same thing as if the choice had been made at the time of his death."

The courts in Lower Canada are not bound by the current of decisions in England, as

the judges in England before 1874, and Lord Alvanley in the case of *Kemp v. Kemp*, considered themselves to be bound in deciding whether a power was exclusive or non-exclusive. Even in England those decisions had caused so much inconvenience that it was found necessary to resort to legislation upon the subject, and the law was amended by Act 37 & 38 Vict., c. 37.

A similar Act was not necessary in Lower Canada. The Courts there were not trammelled by the current of authorities to which Lord Alvanley and other judges in England were forced to yield.

Judge Ramsay, in his written reasons, says, and says with some force, speaking of the law of England before 1874, "It is only by the help of repeated legislation that the law there has come down to that reason from which I apprehend our law starts. It was therefore quite unnecessary for us to make any Act similar to the English Act 37 & 38 Vict., c. 37."

Mr. Justice Ramsay also, in his reasons, states that, "Under the Roman law and under the old régime of France there was a great question as to the effect of the substitution of the children or of a class, as for instance the relations, and that at last it seems to have been determined that when the children of the *grevé* were called *nominatim* they held of the original testator, and that the father could not affect the disposition; but that when the children were called collectively, there was a difference of opinion as to whether the father could select among the children so as to give to some and exclude others." He adds, "Although the affirmative of the proposition cannot be supported on a strictly legal argument, it seems to have prevailed." He then cites some authorities in support of his argument.

Their Lordships are not prepared to say that that exposition of the law is not correct. If, then, a man to whom an estate is given for life, charged with a substitution in favour of his children after his death, can substitute one or more of his children to the exclusion of others, the addition of the words in the present case, "in such proportion as he shall decide," does not affect the nature or substance of the substitution. It only gives

power to the father to do that which he could have done under the general words of the substitution in favour of his children.

It would be lamentable if their Lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the Legislature as fraught with inconvenience and mischief, and thus be driven to such a construction of the will of William as would form a precedent in future cases of a similar nature, and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an Act of Parliament in England to remove. In their Lordships' opinion the decision of the Court of Queen's Bench is correct. They will therefore humbly advise Her Majesty to affirm the judgment of that Court.

The appellant must pay the costs of this appeal.

Judgment affirmed.

Bompas, Q.C., and McLeod Fullarton for appellant.

Macnaughten, Q.C., and Jeune for respondents.

PREPARING FOR TRIAL.

Chief Justice Curtis, of Boston, gave hints as a basis for the following trial rules that are not so generally known as they should be, and yet they very forcibly apply to criminal defences:

1. Pay little attention to the good side of the case at first, that side will take care of itself, but be sure you look well to the bad side—not forgetting to explore the strongest form of the proof, and knowing that an opportunity to prove even what is false may be used by your adversary, unless you have certain means to refute it.

2. Never try to disprove what has not been proven, and supply thereby the missing link in the enemy's chain of evidence.

3. Never forget that an innocent person, with enemies, may be in a more dangerous condition than a guilty one with friends and influence.

4. The pulse of the people beat nearest together through the columns of the press, and will shade the whole story with a jury.

5. Persistent energy in the face of genius and eloquence will bear its fruit in due season if properly directed, but endless travel in the wrong direction will never reach the place of destination; therefore, of all things, be safe in your theory and start out equipped for a trial of hardship. Chas. S. May says:

"The best trial rule I can think of is for the advocate first to possess himself thoroughly of the facts of his case, and to believe in its justice; and then to keep in mind in every step of its progress that the jury is composed of men representing the average common sense and moral sense of the people, actuated by an honest desire to do impartial justice between the parties; and so, in the light of this fact, to be able to see how every proposition or objection, piece of testimony, remark at the bar or observation from the bench would be likely to affect such a body; in other words, for the trial lawyer to imagine himself in the jury box, with their purposes and intelligence, and think how these things would be apt to influence him."—*J. W. Donovan.*

DIALOGUE BETWEEN LAWYER AND CLIENT.

Who taught me first to litigate,
My neighbour and my brother hate,
And my own rights to overrate?

My lawyer.

Who cleaned my bank account all out,
And brought my solvency in doubt,
Then turned me to the right-about?

My lawyer.

ANSWER.

Who lied to me about his case,
And said we'd have an easy race,
And did it all with solemn face?

My client.

Who took my services for naught,
And did not pay me when he ought,
And boasted what a trick he'd wrought?

My client.

—*Albany L. J.*

INSURING A MOTHER-IN-LAW.—The Supreme Court of Pennsylvania, in holding that a son-in-law has no insurable interest in the life of his mother-in-law, has aimed another blow at this much-abused class. The Court sneeringly says that he is not a creditor of hers, nor in any manner legally liable for her support or maintenance, and that he could not inherit from her nor she from him; in fact that there is no consanguinity between them. The mere fact that he married her daughter gave him no pecuniary interest in the preservation of her life; and while the Court does not in words say so, the inference is very plain that it means it to be understood that in the opinion of the Court the son-in-law is so interested in getting rid of his mother-in-law that to insure her life is a gambling contract of the worst kind.—*Washington Law Reporter.*

The Legal News.

VOL. VIII. AUGUST 29, 1885. No. 35.

Simplification of procedure, increase of the number of judges of first instance, coercion of judges to render judgment promptly,—these are questions which have been debated at more than half a dozen bar meetings within as many years. The whole ground has now been gone over in a report submitted to the American Bar Association by Messrs. David Dudley Field and J. F. Dillon. We noticed, on p. 217, the fact that an inquiry was being made into the causes of the delay in the administration of justice. The high standing and long experience of the gentlemen entrusted with the task, as well as the universal interest of the subject, makes their report instructive reading. The *Albany Law Journal* says it gave rise to the greatest and most striking legal discussion of the last thirty years. The upshot was that all the conclusions of the report were adopted by the Bar Association at the August meeting, except that in favor of codification. On this question the Association voted an adjournment for a year. The report, as will be seen, is graphic and interesting, but the recommendations do not contain much that is novel. Forms of procedure are to be dispensed with as far as possible. The number of judges of first instance is to be increased so as to do away with all arrears, and the judges are to be obliged to give their decisions within a limited period after argument. The block of cases in appellate courts is to be prevented by restricting the number of appeals as soon as a block occurs, and until it is removed. This is a rough, but not very equitable method of getting over the difficulty. Why should A be wholly debarred from his appeal in order that B, with a precisely similar case, may be more speedily heard? The remarks in the report upon the improvident issue of injunctions are worthy of special attention. The loose and irregular way in which injunctions are granted now-a-days is a growing evil which should be checked.

The affirmation question came up in the Lord Mayor's Court, London, on the 26th instant. Mr. Charles A. Watts, a printer, of Johnson's Court, Fleet Street, having been called as a jurymen before Sir Wm. Charley, Q.C. (the Common Sergeant), objected to be sworn in the usual way, whereupon Mr. Fitch, the Sergeant-at-Mace, handed to him the affirmation card prescribed by Act of Parliament in these terms: "I, —, do solemnly, sincerely, and truly affirm, and declare that the taking of an oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare that I will well and truly try the issue joined between the parties, and a true verdict give according to the evidence." Mr. Watts, having perused the card, said he was not going to repeat the words upon it. Mr. Fitch: "Why do you object? It is the prescribed affirmation." Mr. Watts: "I object to the words 'according to my religious belief.'" The Common Sergeant: "Then what do you propose as your affirmation?" Mr. Watts: "I will say, 'I, Charles Watts, do solemnly, sincerely, and truly affirm and declare that I will well and truly try the issue joined between the parties, and a true verdict give according to the evidence.'" The Common Sergeant: "Well, I think you may do that." The case, in which the rest of the jury were sworn in the usual way, then proceeded, Mr. Watts, by virtue of having been called first, acting as foreman.

In a case of *Nash v. El Dorado County*, before the United States Circuit Court for the district of California (July 6, 1885), two points of some interest were decided with reference to coupons of bonds. First, it was held that coupons bear interest from the date of their maturity, at the legal rate. Chief Justice Sawyer remarked: "It has been repeatedly so held by the Supreme Court of the United States." Secondly, it was held that the Statute of Limitations runs upon coupons from the date of their maturity. "Each installment," remarked the Chief Justice, "matures at a particular time, and at that time the payee is entitled to his money; the right of action accrues, and an action may be commenced at any time within the time pre-

scribed by the Statute of Limitations after the right of action accrues. I have no doubt, therefore, that the right of action upon the coupons accrues upon the maturity of the coupons, and do not think the statute will be evaded in consequence of the coupons being for interest, and attached to the bonds." See also 6 Leg. News, 385.

**COURT OF QUEEN'S BENCH.—
MONTREAL ***

Joint Stock Company—31 Vict. (Q), c. 25.—*Subscriber before incorporation—Agreement to take Stock.*—The appellant signed an undertaking to take stock in a Company to be incorporated by letters patent under 31 Vict., (Q.) c. 25, but was not a petitioner for the letters patent, nor was his name included in the list of intending shareholders in the schedule sent to the Provincial Secretary with the petition. The appellant's name was not mentioned in the Letters Patent incorporating the company, nor did he become a shareholder at any time after its incorporation.

Held:—(reversing the judgment of the S.C., Cross, J. dissenting)—

1st. That the appellant never became a shareholder of the company, and could not be held for calls on stock.

2nd. (*The Union Navigation Co. & Couillard and Rascony & the same Co.*—followed and approved. *McDougall et al. & the same Co.* distinguished.)

3rd. (Per TESSIER, J.)—That a subscription to take stock in a company to be incorporated is a mere proposition and not a binding promise to take and pay.

4th. (Per RAMSAY, J.)—That under the terms of the Statute 31 Vict., Q. Cap. 25, the only persons who are shareholders in a company incorporated thereunder are those named in the Letters-Patent as such, and those who become members after incorporation.—*Arless & Belmont Manufacturing Co.*, May 21, 1885.

Jugement interlocutoire—Appel—Procédure—Chose jugée—Elections municipales—Commissaires d'écoles—Quo warranto—S.R. B.C., c. 15,

* To appear in full in Montreal Law Reports, 1 Q. B.

ss. 39, 40—C.P.C. 1016—45 Vic., c. 29, s. 2—Art. 346, Code Municipal—*Jurisdiction exclusive.* *Jugé*.—Que l'appel du jugement final de la cour supérieure soulève de nouveau tous les jugements interlocutoires rendus dans la cause, et que le défaut par un défendeur d'exciper ou d'appeler d'un jugement interlocutoire renvoyant son exception à la forme, ne l'empêche pas de discuter ce jugement sur l'appel du jugement final, l'interlocutoire n'étant pas chose jugée sur les questions soulevées par son exception à la forme.

2. Que d'après les provisions de l'acte 45 Vic., c. 29, s. 2, et les articles 346 sqq., du Code Municipal, les contestations d'élections de Commissaires d'Ecoles doivent être portées devant la cour de circuit ou la cour de magistrats, qui ont une juridiction exclusive en ces matières.

3. Que partant le recours par bref de *quo warranto* établi par S. R. B. C., c. 15, s. 40, contre l'usurpation de telles fonctions, est abrogé.

4. Que même si ce recours existait encore concurremment avec celui indiqué par la loi nouvelle, la simple élection des défendeurs comme commissaires d'écoles, sans qu'ils se soient immiscés dans l'exercice de telle charge, ne donnerait pas lieu à l'émanation d'un *quo warranto* (C. P. C. 1016).—*Metras & Trudeau et al.*, May 27, 1885.

Mandamus—Corporation—Fine—C.C.P. 1025.—*Held*, that the fine which a corporation may be condemned to pay under Art. 1025 C.P.C., should be ordered to be paid one half to the Crown and one half to the petitioner.—*Montreal, Portland & Boston Railway Co., & Hatton.* March 24, 1884.

Company—Railway—Negligence.—*Held*:—That no presumption of fault arises against a railway company from a person being injured on the track; on the contrary, it is for the person injured to show that he had a lawful right to be there; and to enable him to claim damages he must also show that the company were guilty of some fault, neglect or imprudence whereby the injury was caused. So, where the plaintiff was injured at a street crossing, and it appeared there was a sign-board indicating the crossing and that the

bell was rung and the whistle sounded to warn passers of the approaching train, it was held that the plaintiff could not claim damages from the company.—*Roy & La Compagnie du Grand Tronc*, May 26, 1885.

Insolvent Act of 1875—Official Assignee continued as Creditors' assignee—Suretyship.—Held:—Where an official assignee under the Insolvent Act of 1875 has taken possession of an insolvent estate in that capacity, and subsequently the creditors have appointed him assignee to the estate without exacting any further security, and while acting as assignee for the creditors he makes default to account for monies of the estate, the creditors have recourse upon the bond for the due performance of his duties as official assignee.—*Dancreau & Letourneur*, May 27, 1885.

Railway—Damage caused by sparks from locomotive—Responsibility.—Held, that a railway company is responsible for damages caused by sparks from its locomotives, notwithstanding the fact that the company has complied with all the requirements of the law, and has used the most approved appliances to prevent the escape of sparks.—*La Compagnie du Grand Tronc & Meegan*, May 26, 1885.

Taxes—Exemption—Educational Institution—41 Vic. c. 6 s. 26.—Held, that a school for the education of young ladies, kept by a private individual, and not under public control, is not an "educational institution" within the exemption of 41 Vict. (Q.), c. 6. s. 26.—*Wylie & La Cité de Montréal*. Monk and Cross, JJ., dissented. March, 1885.

THE ADMINISTRATION OF JUSTICE.

To the American Bar Association:

A special committee, appointed by the association at its last meeting to report at this one, whether the present delay and uncertainty in judicial administration can be lessened, and if so, by what means, have the honor to report as follows:

The resolution assumes that delay and uncertainty in the administration of justice do exist, and the assumption is unfortunately too true. The law's delay has been a re-

proach from time immemorial. In the Great Charter, extorted from King John more than 600 years ago, a solemn promise was made for himself and his heirs, that they would "sell or deny or defer right or justice to no man." And in respect of the most important litigation that could then arise, the further promise was made:

"We or (if we are out of the realm) our chief justiciary shall send two justiciaries through every county four times a year, who with the four knights chosen out of every shire by the people, shall hold the said assizes in the county on the day and at the place appointed. And if any matters cannot be determined on the day appointed to hold the assizes in each county, so many of the knights and freeholders as have been at the assizes aforesaid shall be appointed to decide them as is necessary, according as there is more or less business."

There was furthermore this stipulation:

"We will not make any justiciaries, constables, sheriffs or bailiffs but such as are knowing in the laws of the realm and are disposed duly to observe it."

Four hundred years after these royal promises, Shakspeare, in the soliloquy of Hamlet, counted the law's delay among the ills of life. And the name of the "*salle des pas perdus*" is the sad jest of waiting and weary suitors in France.

The evils of delay and uncertainty every lawyer knows very well, and every suitor knows better. If the chief end of government be, as is often asserted, the dispensation of justice, whatever hinders or embarrasses the attainment of that end is an evil of corresponding magnitude. Society can indeed exist, as it has often existed where judicial administration is uncertain, weak or corrupt; but the effect upon public morals and national prosperity will be, as it has always been, disastrous. It is the concurrent testimony of all history that no country has ever maintained itself long in healthy prosperity where the people felt that their rights were not safe under the law. The insecurity of life and property which a dilatory or uncertain administration of justice entails operates as a blight upon enterprise and frightens away not only the timid, but

all, even the boldest, who desire to dwell in peace and safety. These alternatives are presented to every political society,—justice or violence. If the public authorities cannot provide by peaceful means for the prevention or redress of wrong, private associations will undertake a part of the task, and violence will essay to do the rest. Already we see arbitration committees in large departments of business supplanting the courts, while in other quarters there are occasional outbreaks of violence, scandalous and criminal, liable to confound the innocent with the guilty, and menacing the very existence of social order. Society cannot allow any of its members to take the law into his own hands, or try to right himself by violence. Whenever it does so, it abdicates a part of its functions and in the end must give way to anarchy.

If at the formation of a government it were asked how soon shall redress be made to follow an infraction of the laws, the answer would be—so soon as the facts can be made known to the officers of the law. How near we have come to this ideal will appear hereafter.

The resolution of the association presents three questions:

1. What is the extent of the delay and uncertainty existing?
2. What are the causes?
3. What are the remedies?

The better to answer the first, we sought information from members of the association in the different States; for an answer to the second, we had only to follow the processes of a law-suit, as generally conducted; and in answer to the third, we venture the recommendation hereinafter made, to which the information received and our own reflections naturally led. We assumed that the extent of the delay might best be measured by the period between the beginning and the end of a law-suit and the uncertainty by the number of reversals on appeal, and upon that idea we addressed a series of questions to one or more members of the association in each of the thirty-eight States of the Union. The answers contain a body of useful information and suggestions of which we have been prompt to avail ourselves. A copy of the questions and a summary of the answers are annexed to this report.

EXTENT OF THE DELAY AND UNCERTAINTY.

It appears that the average length of a law-suit varies very much in the different States, the greatest being about six years and the least a year and a half. The uncertainty varies also, the greatest average number of reversals in a single year being forty-eight out of seventy-three appeals, and the least forty-four reversals out of two hundred and forty-four appeals. In one of the States, from a series of Supreme Court reports, twenty-five volumes, taken at random, have 1,180 affirmances and 1,160 reversals. Nearly all the answers agree that the delay and uncertainty can be lessened, though they differ as to the means. Some advise one remedy and some another. Our own views will be given hereafter.

The business in the two most important courts of the country, the Supreme Court of the United States and the Court of Appeals of New York, is well known. That of the former during its last October term, that is from October, 1884, to May, 1885, was as follows: The number of cases on the docket at the close of October term, 1883, was 845; the number docketed during October term, 1884, 470; total, 1,315; number of cases disposed of at the term closed in May, 1885, 464; number of cases remaining undisposed of, 851; total, 1,315; number of cases continued under advisement from October term, 1883, 10; number of cases argued orally, 196; number of cases submitted, 119; number of cases continued, 16; number of cases passed, 8; total, 349; number of cases affirmed, 199; reversed, 97; dismissed, 39; docketed and dismissed, 27; questions answered, 2; settled and dismissed by the parties, 85; dismissed in vacation (under the 28th rule), 15; total, 464. The number of opinions delivered was 272. Judging by the past, it is estimated that the docket at the end of the next term will contain 1,300 cases.

The business of the Court of Appeals of New York was as follows: The number of appeals on the calendar at the beginning of 1885 was 782; when the court adjourned at the end of June for the summer vacation the number was 873. During 1884, 487 decisions were rendered, including appeals from orders entitled to be heard as motions. Some of

these decisions disposed of more than the particular case; one for instance, disposed of thirteen cases then on the calendar. In addition to the 487 decisions just mentioned, there were 92 on motions called non-enumerated. The whole number of decisions during 1884 appears thus to have been 505, leaving a calendar constantly increasing. The number of appeals in 1884—that is, of returns filed in that year—was 670; the number in the first half of 1885 has been 358.

In respect of delays in the other courts of the country, it is difficult to obtain statistics sufficiently comprehensive and at the same time sufficiently minute to form the basis of an exact report. In the City of New York we have however the means of ascertaining with considerable exactness the number of cases brought into the courts and the number decided within a definite period. It is to be regretted that it is not made the duty of some public officer in every State to furnish the statistics of litigation. The laws provide for statistics of many branches of business and many transactions of government; and it is remarkable that provision has not been made for the operations of that department of the government which most affects the security and well-being of the people. In the city of New York, as has been said, we are able to give details of judicial administration, from which some lessons at least may be drawn for the whole country.

There is in this city a Supreme Court of general jurisdiction throughout the State, with seven judges, a Superior Court of general jurisdiction within the city, with six judges, a Court of Common Pleas having also general jurisdiction within the city, and six judges; there is a City Court having jurisdiction of civil actions for money demands to \$2,000, eleven District Courts with jurisdiction of money demands to \$250, and one surrogate, besides three judges of the Court of Sessions and eleven police justices—the last fourteen being exclusively occupied with criminal business—making fifty-one judges in all for a population of a million and a half on Manhattan Island. The business waiting and the business done in these civil courts is reported as follows: On the Supreme Court Special Term calendars from the 1st of Octo-

ber, 1883, to the end of June, 1885, there were placed 1,295 issues of fact and 273 demurrers, the oldest issue being 1st February, 1873, and the latest 16th June, 1885; 612 of these issues and 162 demurrers were tried, dismissed or submitted. Every case was called in its order, and if ready, tried. On the jury (circuit) calendars, from 1st October, 1883, to the end of June, 1885, there were placed 4,518 causes, excluding 228 run down on the first call, and added to the calendar a second time with new numbers. The oldest issue was dated 18th January, 1860, and the latest 22nd June, 1885. Of all these causes, 742 only were tried and 1,123 were dismissed, referred, discontinued, settled or abated. All the causes on these jury calendars were called down to and including 4,003.

From the 1st of October, 1883, to the end of June, 1885, the courts were in session eighteen months, of twenty days for each month, making 360 court days in two years, during which time five causes were daily disposed of, on the average, in the several jury terms, and two causes daily, on the average, in the Special terms.

The business done at the chambers, during this period, resulted in the making of more than 30,000 orders after hearing argument.

In the Superior Court during 1884, the General Term disposed of 192 appeals, the Special Term tried 249 causes, the Jury Terms 689. There are now 1,746 cases awaiting trial, of which 86 are at the Special Term and 1,660 at the Jury Terms. There are no arrears at the General Term. The orders made at chambers numbered 11,983.

In the Common Pleas, during 1884, 372 appeals out of a calendar of 577 cases were decided at the General Term, including 179 appeals from the District Courts; 36 cases out of a calendar of 131 were tried at the Special Term. 229 were tried at the Jury Terms between October, 1883, and June, 1885, out of a calendar of 1,892 cases. 17,870 orders were made at chambers.

In the City Court, 2,257 cases were placed on the calendar, between July, 1884, and July, 1885, of which 1,808 were tried or otherwise disposed of. It takes five months to reach a case in its regular order.

In the eleven District Courts 12,170 civil

actions for damages were tried in 1884, and 33,924 cases of defaulting tenants and of corporation penalties were disposed of. There are no delays. A case is generally tried in two weeks from its commencement. There were only 179 appeals to the Common Pleas, and of these not more than three were taken to the Court of Appeals. In less than three per cent of the cases was a jury demanded.

In respect of uncertainty we can easily find the number of reversals in each State. We content ourselves with four States. An examination of the last volume of Reports of Decisions in the Courts of last resort of New York, Pennsylvania, Ohio, and Virginia, respectively, four States which may be considered representative and which have Courts of Appeal separate from the courts of first instance, gives the following results: Volume 97 of the Reports of the New York Court of Appeals contains 79 decisions, of which 38 were reversals. The judges cited in their opinions 449 decisions, being 353 made in New York, 56 in England, Scotland and Ireland, 8 in our Federal Courts, 7 in Massachusetts, 4 in Pennsylvania, 3 in Vermont, 2 in Connecticut, 2 in New Hampshire, 2 in California, 2 in Minnesota, 2 in Alabama, and in New Jersey, North Carolina, Kentucky, Florida, Virginia, Indiana, Maine and Iowa, one each. Volume 105 of the Pennsylvania Supreme Court Reports contains 95 decisions, of which 44 were reversals. The citations of the judges were 451. Volume 39 of the Ohio Supreme Court Reports contains 98 decisions, of which 46 were reversals. The citations were many. Volume 78 of the Virginia Supreme Court Reports contains 81 decisions, of which 40 were reversals. The citations were 576. The sources of these citations made by the judges of Pennsylvania, Ohio and Virginia in their opinions, were as various as those made by the judges of New York.

These were the decisions cited, examined and commented on by the judges in making up their own opinions. But the decisions cited by counsel and pressed upon the judges for their consideration were, it is safe to say, ten times as many. In volume 88 of the New York Reports, the number of cases cited by counsel was 5,037. A single case reported

in volume 97 shows that the counsel on the two sides cited 285 decisions, of which 125 had been made in New York, 61 in England, 2 in Ireland, 4 in Pennsylvania, 4 in North Carolina, 4 in Massachusetts, 2 in New Hampshire, 2 in New Jersey, 2 in Kentucky, 2 in the Federal Reports, and from Maine, Vermont, Iowa and South Carolina, 1 each.

Some of the appeals were from courts which were themselves Courts of Appeal from lower courts. Thus the cases in the New York Court of Appeals were reviews of judgments and orders in the General Terms of the Supreme Court and the Superior Courts of cities, rendered on appeals in each from a single judge of the same court. Volume 42 of the New York Supreme Court Reports contains 130 cases reported in full, 14 "memoranda of cases not reported in full," and 317 "decisions in cases not reported." Of the first two classes, 82 were reversals, that is to say, 82 out of 144; more than half. Of the last class 69 were reversals, that is more than one in five; and of the whole 461 cases decided, 96 were reversals. The first page of the volume mentions 14 cases, reported in 8 volumes of Hun's Reports (25 to 32) as having been taken by appeal to the Court of Appeals, of which five were reversals and one a modification of the decision below. This volume 42 contains a list of 1,120 decisions cited by the court; whether cited in making the decisions not reported does not appear, but probably they were the citations in the cases reported fully or partly. In that view, if an average could be made, each of the 144 decisions rested on about eight previous decisions. Now it is probable that of the decisions in cases not thought worth reporting, few, if any, went to the Court of Appeals. Taking that for granted, it shows that the defeated parties acquiesced in the 69 reversals. Of the other cases it would require an actual count to show how many of them were reviewed by the Court of Appeals.

THE CAUSES OF THE DELAY AND UNCERTAINTY.

The best method of ascertaining the causes of delay is, as we have said, to follow the usual processes, and to discuss them as we go along. The first natural step is a complaint of the person aggrieved. By the common

law this step was full of danger ; it was necessary to choose first between two highways, one called legal and the other equitable, and on turning into the former it was found divided into several lesser ways, or by-ways, called forms of action. The suitor was obliged to choose one among them all, at the hazard of irretrievable defeat. This was the rule of the common law, and is still the rule of about half the States of the Union. The other method, that which the other half of the States and all the Territories but one now pursue, is to have one highway only, or to drop the figure, one form of action, in which the facts are to be set forth as they are or are supposed to be, and such relief sought as those facts may warrant. Between these two methods we see no room for doubt as to the choice. The methods of common law were unwise and injurious. They were unphilosophical ; they had no significance except as marks of a school of dialectics, now in all else forgotten, and they exposed the suitor to unnecessary entanglement in a maze of forms, over and above the hazard of the law and the evidence ; the hazard of doubtful law conjectured out of irreconcilable precedents, and of disputed facts extracted from contradictory evidence.

A lawsuit is a contention before the judges of the land respecting an alleged infraction of law. Whether the complaint be made by the State or by the citizen, whether the demand be for the prevention or redress of a private wrong or the punishment of a public one, the ground of the complaint always is, that the defendant has violated, or is about to violate, a legal precept. Two fundamental questions are thus raised—what is the fact and what is the law. To the answering of these two questions all others tend, and as they are answered surely, easily and speedily or otherwise, the success or failure of judicial administration is determined.

The theory of a lawsuit is therefore to hear what the parties have to say, and to decide between them. In doing this, the simplest and most direct method is the best. The plaintiff must make his statement ; that is the first step ; the defendant must make his answer or be held to admit the truth of the complaint, that is the second ; if they differ,

the truth of the fact must be ascertained ; that is the third ; and then the law must be applied, which is the fourth step and the last if there be no appeal. These several steps may be shorter or longer. A short one is the best if it be a sure one. Some side steps may have to be taken, according to the circumstances of particular cases. But in all, not a single unnecessary step should be required or allowed. In other words, no form or proceeding should be permitted which is not necessary to ascertain or preserve the rights of the parties, no form or proceeding that cannot be understood by either party, none that causes needless delay or needless expense. There must however be a complaint, and if there be an answer there must be a trial of the fact, a judgment of the law, and an execution of the judgment with occasional incidental proceedings, such as orders made in the progress of the cause to insure the efficiency of the judgment. In other words, there may be these several processes—the complaint, the answer, possibly a reply, the provisional remedies of arrest, replevin, injunction, attachment, receiver or deposit, a trial of the facts in issue, the judgment of the law, the execution of the judgment and one or more appeals, twelve or fourteen distinct processes, most of which are or may become necessary in a severely contested lawsuit. The problem is how to expedite them all, preserving at the same time every right of the parties, and to cut off, with an unsparing hand, whatever is not necessary to this design.

Before discussing the regular and essential processes, let us discuss briefly the incidental ones, and say here once for all what we have to say about them. The first observation is, that they should never be allowed to retard the progress of the main contention. Whatever motions may have to be made respecting an arrest, an injunction or any other of the provisional remedies, they can be made without postponing the issue, the trial or the judgment. The practice of converting the incidental into the principal is not to be commended ; on the contrary, it is to be strongly condemned. The practice, however, grows apace. Actions are brought, not with a view to the

final trial and judgment, but with a view of gaining a temporary advantage, which may, from the sheer pressure of inconvenience and delay upon an adversary, force him to yield, through the operation of an arrest, or an injunction or a receiver. This is a dangerous proceeding. The motions are heard on one-sided affidavits, evidence of the loosest and most dangerous kind. The abuse of injunctions especially has grown to be a serious grievance. We have no hesitation in recommending that they should never be granted, except on positive evidence, after adequate security given to cover all possible injury from their operation, with an opportunity afforded of hearing both sides without delay, and the positive requirement of a decision within a fixed and short period. We do not think injustice would be done if a decision within a week were required. In the courts of the United States a restraining order cannot be made, unless "there appears to be danger of irreparable injury from delay."

Returning now to the regular processes of a lawsuit, we must remember that one of the parties at least is generally not averse to delay. It often happens, more often than otherwise, we fear, that one of them is very desirous of delay and strives for it. So that when we are considering how the several steps in a suit can be shortened, we must consider how they can be shortened against the will of the other party. For if both parties really desire a speedy decision, they can materially shorten every step and hasten every movement.

Before proceeding to consider these questions, however, let us observe that all lawsuits are not necessarily or properly to be treated in the same way. That indeed was the old plan of the English common law. A claim on a note of hand was treated like a claim to an estate. The parties came into court in the same solemn manner, the written pleadings were of the same formality, the trial was by the same machinery, the decision and the enforcement of it brought about by the same methods. Here, we think, was a mistake. When the parties have themselves stipulated in writing for the payment of a given sum of money or the delivery of a specific thing or the per-

formance of any other specific act at a specified time, the process in dealing with a dispute between them should be summary. They have stipulated for a certain thing to be done at a certain time, and except in very exceptional cases should be held to a prompt disposition of their respective pretensions. This has been done in the State of New York by a special statute, under which a tenant who fails to pay the stipulated rent at the stipulated time may be made to surrender possession to his landlord, leaving all other questions between them to be settled afterward. And in England it has been provided by statute, that upon a promissory note or other negotiable instrument, the holder may have summary judgment, unless the defendant shows upon oath reasonable grounds of defence. We think, therefore, that a distinction should be made between different classes of claims, and while most of them may be left to the ordinary processes, some should be subjected to those which are summary. The reason for the distinction lies in this, that in the latter class of cases the parties have agreed upon every thing, or nearly every thing which the courts could have done for them, and have left little to be disputed. And furthermore, the exigencies of commerce will not admit of the delay which other claims may suffer, without the same loss or inconvenience.

Confining ourselves for the present, however, to the delays in an ordinary lawsuit, how are they to be dealt with? Opportunity to answer the charge must be given to every person charged with an infraction of law. Such an opportunity involves some delay. It is an inconvenience inseparable from human administration. Slow justice is better than swift injustice. Do your work as quickly as you can, but do it well, is the law's commandment to all its judges. And as to certainty—that is to say, absolute certainty—it cannot be affirmed of any thing dependent on human judgment. The most that a judge can declare is this: I infer from the evidence such to be the fact, and I find in the law-books such to be the law. It is only omniscience and omnipotence that can in an instant discern the fact and administer the law. All that can be expected of any system of judicial administration among men is, that it makes the nearest approach that man can make to the unerring judgment of an infallible mind.

[To be continued.]

The Legal News.

VOL. VIII. SEPTEMBER 5, 1885. No. 36.

The judgment of the Judicial Committee of the Privy Council in *Carter & Molson and Holmes & Carter* will be found in the present issue. The opinion of their lordships affirms in substance the decision of the majority of our Court of Queen's Bench. 6 Legal News, 372.

On an application recently in England for a new trial, Lord Chief Justice Coleridge and Mr. Justice Butt refused without hesitation to admit an affidavit made by some of the jury, that in giving their verdict they had misapprehended the issues before them. The Court declared that a jury cannot be allowed to impugn their own verdict. The precedent referred to by the Court was *Clarke v. Stevenson*, 2 W. Bl. 803. In *R. v. Woodfall*, 5 Burr. 2661, the "Junius" libel case, Lord Mansfield stated that though in cases of doubt as to what passed in giving the verdict, the affidavits of jurors may be read on a motion for a new trial, yet "an affidavit of a juror never can be read as to what he then thought or intended."

The case of *Sharon v. Hill* has been proceeding before an Examiner-in-Chancery at San Francisco, but the Examiner has found his task beset by unexpected difficulties. The female respondent, after repeatedly interrupting the proceedings by excited remarks, finally drew a pistol from her satchel and pointed it at the counsel on the other side. The Examiner then suspended the examination and reported the circumstance to the Court. Chief Justice Field, of the United States Circuit Court, held that this was contempt of Court, and it was ordered "that the marshal of the court take all such measures as may be necessary to disarm such defendant, and keep her disarmed, and under strict surveillance whilst she is attending the examination of witnesses before said examiner, and whenever attending in court, and that a deputy be detailed for that purpose."

PRIVY COUNCIL.

LONDON, July 4, 1885.

Coram LORD WATSON, SIR BARNES PEACOCK, SIR RICHARD COUCH, SIR ARTHUR HOBHOUSE.

CARTER (plff below), Appellant, and MOLSON (contest below), Respondent.

HOLMES et al. (intervenants below), Appellants, and CARTER (plff below) Respondent.

Sale—Executors—Insaisissabilité—Substitution—Registration—Rights of Substitutes.

The respondent Molson hypothecated immoveable property which had formed part of his father's estate, and which he held under a deed of sale to him from two of the executors (he being one).

Held: (Confirming the judgment of the Court of Queen's Bench, *Montreal*—6 Legal News 372) 1. That where power was given by a will to two of the executors to sell immoveable property belonging to the estate, a sale by two of the executors to one of themselves was void.

2. That the effect of the sale to respondent was merely to convey the property to him as his share of his father's estate subject to the conditions of the will, by which the property and revenues were insaisissables.
3. That the registration of the deed of sale in which reference was made to the will, was sufficient notice to an onerous creditor of the title under which the respondent held the property hypothecated by him.
4. That even if this were not so, the appellant must be held bound by the knowledge which the agent to whom he confided the duty of attending to his interests possessed, that the property was held by respondent under conditions and limitations.
5. That dividends of shares of bank stock not identified as part of respondent's share of his father's estate, were seizable.
6. That substitutes, who have no interest in the revenues during the institute's lifetime, have no right to intervene in order to oppose the seizure of rents and revenues of property subject to a substitution accruing during the lifetime of the institute.

PBE CURIAM. On the 9th of February 1875, John Thorold Carter advanced \$30,000 upon

a mortgage, by which the borrower, Alexander Molson, became bound to repay that sum in six years, and also to pay interest, half yearly, at the rate of $7\frac{1}{2}$ per cent. per annum; and, in security for the due payment of principal and interest, mortgaged and hypothecated a lot of ground and a tenement erected thereon, situated in St. James Street, Montreal. Thereafter, on the 17th of April 1877, in consequence of default in payment of interest, Carter recovered judgment in the Court of Queen's Bench against Molson, founded on his personal covenant in the deed of mortgage, for \$31,125, being the amount of principal and interest due at 1st January 1877. In virtue of that judgment, Carter proceeded to attach, by writ of *Saisie-arrêt*, the rents of the mortgaged property in St. James Street, which had been let to one Allan Freeman, and also the dividends which had accrued or might accrue upon 148 shares of the stock of Molsons bank, which stood in the books of the bank, in the name of "Alexander Molson, in trust for Eliza A. Molson *et al.*"

The right of his creditor to attach these rents and dividends was contested by Alexander Molson, upon the allegation that the St. James Street property, as well as the bank stock, formed part of his one-fifth share of the residue of the estate of his late father, John Molson; that, by the will of the deceased, his right to both was *gratè de substitutions*, in favour of his wife and family, and his usufruct was expressly declared to be *legs d'aliment*, and not arrestable for his debts. In the course of the litigation which followed, two separate petitions were presented for leave to intervene, the one by Eliza Ann Holmes, wife of the debtor, in her own right, and the other by the same lady as tutrix *ad hoc* to their minor children, along with their daughter Elizabeth, who had attained majority.

In the Superior Court, Mr. Justice Papineau, upon the 30th June 1881, rejected the contestation of the judgment debtor, with costs, and sustained the right of the arresting creditor, both as to rents and dividends; and, at the same time, in both applications for intervention, the learned Judge decided, with costs, against the petitioners. The Court

of Queen's Bench, upon the appeal of Alexander Molson, by their judgment rendered on the 24th March 1883, in substance affirmed the decision of Mr. Justice Papineau, so far as concerned the dividends, which they declared to have been validly arrested in the hands of the bank; but reversed his decision, in so far as it related to the rents of the St. James Street property, and quashed the attachment made in the hands of Allan Freeman. The debtor was condemned to pay to the arresting creditor the costs of the contestation with regard to the bank dividends in the Court below; whilst the creditor was condemned to pay to his debtor the costs of the contestation in the Court below with regard to rents, as well as the costs of the Appeal. By a separate judgment of the 24th March 1883, the Court of Queen's Bench, in the appeals taken by the intervening petitioners, rejected their contestation, and confirmed the decision of Mr. Justice Papineau, with costs.

Against these judgments four separate appeals have been presented to Her Majesty in Council. Mr. Carter complains of the decision of the Queen's Bench, in so far as it reverses the judgment of the Superior Court and quashes his arrestment of the rents of the St. James Street property; Alexander Molson complains of decisions of the Courts below sustaining the writ of *Saisie-arrêt* as regards dividends arising upon the 148 bank shares; and the intervening petitioners complain of the decision by which their respective contestations have been rejected. These appeals have been consolidated, and heard as one cause, but must now be separately disposed of, inasmuch as they do not depend upon the same considerations either of fact or law.

To begin with the rents of the St. James Street property. It was argued for the appellant Carter that there has been no deed or document registered which constitutes a legal act of substitution, or, in other words, discloses the fact that the title of his debtor to that property is derived by testamentary gift from his father, the late John Molson, and is therefore affected by the conditions and limitations appearing in the will of the deceased. It was said that, *ex facie* of the the register, the property is vested in Alex-

ander Molson, not as a legatee, but as a purchaser for value from the administrators of his father's will; and, consequently, that the appellant, an onerous creditor who advanced his money on the faith of the register, is not affected by the latent conditions of the will. It was also maintained for this appellant that, inasmuch as, by the deed of mortgage of February 1875, Alexander Molson declared that the property well and truly belonged to him, he is now estopped from alleging, in this suit, that it is in reality held by him as an integral part of his share of his father's succession.

In the argument addressed to their Lordships from both sides of the bar, it was conceded that the substitution imposed by the 13th article of John Molson's will upon the share of Alexander Molson, in favour of his widow and issue, cannot receive effect against a creditor in the position of the appellant, unless the substitution be duly registered (C. C., Sects. 938, 939), so as to give him due notice of the interests of the substitutes. Mr. Justice Papineau decided this branch of the case against the judgment debtor, upon the assumption that the will of John Molson had not been registered. That assumption seems to have been based upon a somewhat strict and technical interpretation of an answer made for Alexander Molson to the 13th interrogatory contained in the articulation of facts filed for the appellant on the 16th March 1879. There is ample evidence to show that the will was, in point of fact, duly registered in November 1860; and having regard to the very inartificial and ambiguous character of the interrogatory in question, their Lordships do not hesitate to agree with the Court of Queen's Bench in holding that the registration of the will has been sufficiently established.

In February 1875, when the appellant lent his money to Alexander Molson, there were already two deeds on the register, evidencing the title by which the borrower held the St. James Street property. The one of these was the will of John Molson already referred to, and the other was a deed, dated the 15th June 1871, and registered the 11th June 1872, by which William Molson, and the judgment debtor Alexander Molson, as acting executors

and trustees under the will, sold, assigned, and transferred that property to the said Alexander Molson. It does not appear to their Lordships to admit of dispute that all persons who transacted with Alexander Molson on the faith of his being the owner of the St. James Street property were bound to inform themselves of, and must be held to have known, the tenor of these two deeds, because the deed of 15th June 1871 constituted Alexander Molson's immediate and only title to the property, and it sets forth, *in gremio*, that his authors held the property under the trusts of John Molson's will, and had transferred it to Alexander Molson by virtue of a power of sale said to be contained in the will. Accordingly, if it be the case (as the Court of Queen's Bench have held), that the deed of June 1871, though professing to give effect to a transaction of sale, was in reality a conveyance to Alexander Molson of that which had been allotted to him as part of his fifth share of the residue of his father's estate, and that the terms of the registered deeds were sufficient to notify that fact to the appellant, or to put him upon his inquiry in regard to it, it seems to follow that he cannot prevail in this appeal. In that case, the property would be identified, on the face of Alexander Molson's title, with his share of residue under his father's will; and every person dealing with him on the faith of that title would either have the knowledge, or the means of informing himself, that the property, as part of that share of residue, was *grevé de substitutions*, in favour of Alexander Molson's wife and children, and that his usufructuary interest was not arrestable.

The evidence adduced in the Superior Court establishes, beyond all doubt, that there never was any contract, between Alexander Molson and the administrators of his father's will (of whom he was one), for the purchase and sale of the St. James Street property. The property was, no doubt, exposed to public auction, along with other heritable subjects forming part of the residue, and the whole subjects so exposed were knocked down to two gentlemen, other than Alexander Molson, who each represented beneficiaries entitled to one-fifth of residue. But these gentlemen were merely nominal

purchasers. The auction sale was not resorted to for the purpose of selling and dividing the proceeds,—the only purpose for which a sale was authorized by the will,—but for the purpose of ascertaining the value of the subjects exposed, in order to their partition among three of the five residuary legatees. Accordingly these legatees, after the auction sale, at which Alexander Molson was not a buyer, agreed to divide the subjects which had been exposed, not according to the prices at which they had been knocked down, but according to an estimate based on an average of these prices. Upon that footing, the St. James Street property was allotted to Alexander Molson, as part of his share; and there appears to be no ground whatever for supposing that the trustees of the will thereafter sold to him his allotted portion for the amount of the estimate, even if such a sale had been within their power, which it clearly was not.

The deed of 15th June 1871 purports to be a conveyance of the property in question to Alexander Molson, in pursuance of a contract by which the trustees of his father's will had sold it to him for the amount at which its value was estimated for the purpose of partition, as already explained. In point of fact, the deed appears to have been framed by the grantors in flagrant disregard of their duty as trustees, and to have been a colourable and not very creditable device for giving Alexander Molson a larger interest in the property than he was entitled to, and for defeating the intentions of the testator with respect to substitutions and the *insaisissabilité* of his sons' usufruct. Although that is proved, in the estimation of their Lordships, to have been the true nature of the deed of 15th June 1871, it does not follow that the conditions of John Molson's will could be held to affect the property in a question with any onerous creditor of Alexander Molson, to whom the deed itself gave no notice, and who had no knowledge otherwise of its real character. But the deed of June 1871 refers to, and by reference, incorporates certain deeds of transfer and agreement executed by the executors and trustees of the will of John Molson, for the purpose of vesting his share of residue in Alexander Molson, and one of these deeds,

dated 15th June 1871, appears to their Lordships to indicate very plainly that the St. James Street property had not been sold for the purpose of dividing the price, but had been allotted to Alexander Molson as part of the *corpus* of his share of residue. At all events, the terms of that deed, and its relative schedules, appear to their Lordships to be quite sufficient to notify to any person dealing with Alexander Molson, on the faith of the deed dated 15th June 1871, and registered 11th June 1872, that the transaction which it professes to embody was, in reality, either a legal partition or an illegal sale.

It is, however, hardly necessary, for the purposes of this appeal, to determine what would have been the effect of these indications of the true character of the so-called deed of sale, derivable from its own terms, upon the rights of a creditor of Alexander Molson, who had no information except that which he had obtained, or might have obtained, through the register. The appellant, Mr. Carter, does not occupy that position. His agent in negotiating and carrying through the loan transaction of 9th February 1875, was the Hon. J. J. C. Abbott, who is proved to have been cognizant of the whole proceedings in the distribution of the residue of John Molson's estate, and to have taken an active part in advising and completing the arrangements by which his fifth share, including the St. James Street property, was transferred to Alexander Molson. The appellant is affected by the knowledge of the agent to whom he confided the duty of attending to his interests, and that knowledge was amply sufficient to inform its possessor that the deed conveying the St. James Street property to Alexander Molson, though professedly a deed of sale, was in substance and reality the transfer of an estate which had been specifically allotted to him as part of his share of residue. In these circumstances, their Lordships are of opinion that the appellant Carter must be treated as having full knowledge that the property was vested in his debtor, subject to all the conditions and limitations imposed by the will of John Molson.

Next, as to the appeal of Alexander Molson with regard to bank dividends. The writ of *Saisie-arrêt* has only been sustained, as an at-

tachment of the dividends which may become payable to Alexander Molson in respect of the 148 shares in question. The sole ground upon which these dividends are said to be placed beyond the diligence of his creditors is, that the 148 shares either are, or represent, part of 640 shares of the stock of Molson's Bank which were transferred to Alexander Molson, as an integral portion of the fifth share of residue, settled upon him and his wife and family by his father's will. Their Lordships see no reason to differ from the law laid down by C. J. Dorion, to the effect that these dividends would be protected from arrestment by the 18th article of John Molson's will, if it were proved to be the fact that the 148 shares form part of the 640 originally transferred to Alexander Molson by the executors of the will, or were purchased with the proceeds of these original shares. Accordingly the only question requiring to be decided, in this appeal, is one of fact. Their Lordships are willing to assume (although it is unnecessary to decide) that the *onus* of proving that these 148 shares neither are nor represent any part of the residue of John Molson's estate lies upon the arresting creditor. He has proved, by clear and satisfactory evidence, that, at and prior to the 12th May, 1873, Alexander Molson had divested himself of the whole of the 640 shares which had been transferred to him, in 1871, by his father's executors; and that 115 of the 148 shares in question never belonged to his father's estate, having been vested in Alexander Molson before the residue was divided. That evidence, in the opinion of their Lordships, not only establishes the right of Mr. Carter to attach the dividends arising upon these 115 shares, but throws upon the appellant, Alexander Molson, the *onus* of showing that the remaining 33 shares were either part of or purchased with the proceeds of the 640 shares, neither of which facts has he made any attempt to prove.

Then as to the appeals presented by the intervening petitioners. Both of these depend upon precisely the same considerations, and may be disposed of as if they were one appeal. The petitioners have not, and do not assert that they have any direct or legal interest, either in the rents of the St. James Street property, or in the dividends on the 148 bank

shares, which accrue and become payable to Alexander Molson during his lifetime. On the other hand, it is not disputed that they have material interests, entitling them to resist any attachment of the *corpus* of the property or of the shares, at the instance of a creditor of Alexander Molson, which might have the effect of defeating their right as substitutes, in the event of Alexander Molson's death. They do not, however, allege that the writ of *saisie-arrêt* will attach either the *corpus* of the 148 bank shares, or the dividends accruing upon them, after the death of Alexander Molson. All that they do allege is, that these shares, as part of the residue of his estate, are subject to the substitution in their favour contained in John Molson's will, and that the dividends payable to the institute are, in terms of that will, not arrestable. The only interest in respect of which their right to intervene in the present litigation is maintained, is the apprehension that some points may be incidentally decided, between the arresting creditor and Alexander Molson, which may prejudice their rights at some future time. It is not said that any judgment in this suit can possibly enable the creditor to attach the estates which they may eventually take, assuming the substitutions in their favour to be valid; nor is it suggested that anything decided in this suit between the judgment debtor and creditor, with regard to the validity of these substitutions would be binding upon them as *res judicata*. What they do plead is that such a decision might afford an objectionable precedent, if and when they require to assert their rights judicially, and consequently, that they have the right to intervene. That plea appears to their Lordships to be untenable. Section 154 of the Procedure Code, which regulates this matter, gives the right of intervention to the parties who are "interested in the event of a pending suit." The event of the suit can only refer to the operative decree which may ultimately be given in favor of one or other of the parties to it, and not to the views of fact or law which may influence the Court in giving decree. To admit the appellant's plea would involve the admission of a right to intervene on the part of every person who had an interest in preventing a decision being

given *inter alios*, which might be cited as an authority against him in some other suit. Section 154 appears to have been framed for the very purpose of limiting the right of intervention to those persons who can show that a final judgment may possibly be obtained in the suit, which will enable the party who obtains it to possess himself of their estate, or otherwise to impair their legal rights.

Their Lordships are accordingly of opinion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. There will be no order as to the costs of any of these appeals.

Appeal dismissed.

THE ADMINISTRATION OF JUSTICE.

[Continued from p. 280.]

To the American Bar Association :

Beginning with the first step of the complaining party, his complaint, it should be as simple as possible. Its only office is to apprise the other party of what is charged and demanded against him, and to confine the action of the court to the charge made. The next step is the answer. How much time is it reasonable that a defendant should have for answering a charge? And preliminary to that question is another, that is, where is the answer to be made, for if it must be made in open court, the parties will have to wait for its sitting. But if the answer may be delivered in writing at any time, either by filing it with the clerk or giving it to the party, such a time should be fixed as will, on an average, answer the needs of a defendant, so that there shall be as little occasion as possible for an application to enlarge it. Ten days will answer in most cases; twenty days should answer in all but the most exceptional ones. Oral pleadings are not suited to the habits of our people. The time of the suitor has become too much occupied. Written pleadings, rightly conducted, are in fact labor-saving processes. Convenience, as well as certainty, require that both complaint and answer should be formulated and reduced to writing.

The charge and defence being developed, the State is to intervene and dispose of the controversy. Whatever of delay now occurs

is the fault partly of the State and its officers and partly of the contestants. The State has an interest in bringing the contention to an end as speedily as possible for the sake of peace, if there were no other reason. But there are other reasons. The mere presence on the record of an undecided case tends in some degree to interfere with the disposition of the other cases, for it stands in the way, and acts as a menace of intrusion into the order of business. Therefore wherever the court is ready, and the parties without sufficient excuse are not ready, the case should be dismissed from the court.

Supposing however both the parties to be ready, the State should be ready also. This is a duty which the body politic owes to all suitors; a duty which however neglected, is none the less imperative and of universal application. The State should never keep the citizen waiting for justice longer than is necessary to bring the judges to their seats. There are two maxims, a strict adherence to which would go far to wipe away the reproach of the law's delay, one that the State should be ready for the trial when both the parties are ready, and the other that if both are not ready when one of them is, the unready one should be put in default, unless he offers an excuse satisfactory to the court, and conformable to previously defined rules. Make the rules for these excuses precise and inexorable. The parties can of course waive them if they choose. But if insisted upon by either, the court should not be permitted to dispense with them any more than it is permitted to dispense with the period of limitation for an action or an appeal. One of the rules should declare that the absence or engagement of counsel elsewhere is not to be accepted as an excuse. To allow it would be to impose a sacrifice which neither the counsel nor the party in the one suit has a right to expect of either counsel or party in the other. And moreover the interests of the public are opposed to it. Neither should the convenience of a party be an excuse. It is especially his business to be in court, when his adversary is there to confront him. No more should the absence of a witness, unless it be shown that the

party offering it has done everything that could be reasonably expected of him to prevent the absence. These may all be rules now, in some courts and places, but they are generally enforced with laxity, if enforced at all.

Suppose the trial once begun, how can it best be brought to an end? By trying the issue as rapidly as may be with safety, and so trying it that the process shall not have to be repeated. Observe the process as it is now presented. No sooner is the trial opened than a wordy debate begins. Question after question is objected to; the objection is discussed for and against; the law reports are brought in and read, that it may be seen what some judge, learned or unlearned, in the same State or some other State, has said on some question, more or less like the present, and all this with the certainty, that if on one or more appeals, other judges think that the question has been improperly admitted or improperly rejected, the whole trial goes for nought, and a new one has to be fought over with perhaps the same experience and the same results. The wonder is, not that so many trials fail, but that any one ever gets through aright. It follows, as might have been expected, that we so often find practical failure in the search for theoretical perfection. It might be well, possibly, if there were time for it, that every question should be discussed until nothing more could be said on either side, but if that were to be done, no patience could survive the trial. The habits now prevailing and growing worse every day must be changed; the wearisome questioning of witnesses must be curtailed; the interminable debates must be stopped; appellate judges must consider more often, not whether a question was theoretically right, but whether its reception or rejection was practically injurious; and especially when a jury is in the box, the court must look to their convenience and spare their time. In short, a radical reform in the methods of trial courts must be somehow wrought out.

This picture of a jury trial, though by no means imaginary, may not answer for all parts of the country, but there is so much similarity that we may safely rea-

son from this specimen. We know that a great deal of time is misspent. First, the unpunctuality of the judge, if unpunctuality there be, as there often is, is a serious grievance. He has no right to trifle with the time of lawyers, suitors and witnesses, and even though he may perhaps have the excuse that he has been detained by judicial duty at chambers, he should remember that one of the first duties of a public officer, especially a judicial one, is so to arrange his engagements that one shall not clash with another, and the public not to be put to inconvenience.

Let us take our seats as spectators of a severely-contested jury trial in a court of general jurisdiction of one of our cities, say in the city of New York, and see how one of them at least is conducted. The hour of the sitting is fixed for eleven o'clock. At that hour a crowd of lawyers, suitors, witnesses and spectators is in attendance ready for the judge. He comes, perhaps punctually, and perhaps not punctually, but after a few minutes, or a quarter of an hour, or half an hour, nobody can foretell which.

At last he appears, and begins by asking what suits are ready, or rather by calling over the calendar, an unintended but real invitation to the parties, one or both of them, not to be ready. This call, and the little debates which follow, take perhaps another half hour; so that the spectators may think themselves fortunate if they see a suit begun as early as twelve o'clock. It is then brought on and the names of the attending jurymen are called as they are drawn one by one from the wheel. Some questioning generally follows; now and then a contest and a side trial over one or more of the names drawn; but at last a jury is completed. Then the case is opened by the plaintiff, and the examination of witnesses begins. When three or four questions have been put and answered, some objection is made; it is duly debated for a few minutes, or it may be for an hour, or even four hours; the judge decides, the question being allowed or disallowed; an exception is noted, and the questioning starts again. In a short time however comes another objection, when the process of debate, decision and exception is repeated, and so on until perhaps the day is spent before the

first witness is dismissed, and an adjournment to the next day is taken. The next day comes and goes, with the like experience, and so another, and yet another, until at last, the testimony being finished, a discussion is opened upon one or more requests to the judge for his charge to the jury; then follows the charge, the exceptions to the charge come after, and finally the verdict, with perhaps fifty or a hundred exceptions on the record.

The trial being ended, a re-examination of all the legal questions that arose can generally be had if either party desires it, and one or the other will desire it, if he thinks he can derive advantage from it. The method of re-examination differs in different States; in some the questions are carried directly to another court; in other States they are re-examined in the same court by other judges or possibly by the same judge. The success of whatever method depends upon the ability of the judges; of the trial judge in the first place, and the re-examining judges in the second. An incompetent judge is an expensive officer. It were better for the State if all the incompetent aspirants for judgeships who beset nominating conventions or executive chambers, were provided for at the public expense in some other way, than that they should be seated upon the bench to harass and bewilder suffering counsel and more suffering suitors.

Whatever may be said in other respects of the institution of the jury for civil cases, it cannot be denied that it is the cause of great delays. This is the effect principally of two causes, one of which is the requirement of unanimity. When the jury is discharged, by reason of disagreement, the case has to be retried. Another and much more considerable cause of delay in the final result is the ordering of a new trial for a misdirection of the court or an erroneous admission or rejection of evidence. This may be obviated to a great extent by requiring the verdict to be special, upon questions submitted by the judge. The result would be that an error of the judge upon a trial would not require a new trial, unless the error related to a finding essential to the judgment;

that is, one without which the judgment could not have been rendered. We shall recur to this subject.

Costs, too, have something to do with the delays. Two theories are propounded respecting them; one that they should be made sufficient to cover all the expenses of the successful litigant; the other that they should cover only the fees of the court officers, such as clerks and sheriffs. On one side it is argued that a party who has put his adversary to needless expense and suffered defeat in the suit ought justly to indemnify this adversary; on the other side it is argued that no system of costs will prevent an unjust claim or an unjust defence, and that in most instances they are instruments of oppression, rather than of justice, and if they are made to depend at all upon the discretion of the judge the discretion is dangerous. The choice between the two depends more on experience than on theory. And we think experience has shown that to allow no costs, except the fees of the officers, is better than to attempt an indemnification for the expenses of the prevailing party.

It appears to us that a great deal of time is wasted and no little uncertainty introduced into the law by the habit of delivering long opinions at the time of pronouncing judgment. Any one who will look into the decisions of Lord Mansfield will perceive the difference between the old habit and the new, much to the disparagement of the latter. Our volumes of reports have too many dissertations in the shape of opinions. The inconvenience thence arising is manifold; the time of the judges is wasted; the reports and the cost of the reports are grievously swollen; and worst of all, there is the chance, with reverence be it spoken, that some of the dissertations, if their expansion goes on, may be delivered in clouds of verbosity, covering as with a fog the points to sight and steer by.

We think moreover that giving by statute a preference to certain cases on the calendar is a mistake. The courts may well be trusted for the regulation of their own calendars; and when they find a case to be of such public importance as to require a hearing before all others they will be quite sure so to hear it. Whenever the State enacts that one case shall be heard before another, which stands ahead of it in order, it confesses its own negligence or inability to provide a prompt hearing for all.

[To be continued.]

The Legal News.

VOL. VIII. SEPTEMBER 12, 1885. No. 37.

Baron Huddleston, at Chelmsford, July 29, in the course of some remarks upon the circuit system of England, criticized the establishment of additional courts of appeal. His lordship observed: "A new Court of Appeal was constituted instead of the old Court of Error in the Exchequer Chamber, and appeals were greatly increased. Whether this was desirable or not, the Legislature so considered. If I were to express my own opinion I should say that it was not favorable to the interests of public justice. It appears to me that to give undue facilities for appeals from Court to Court tends to nurture the spirit of litigation, and to lead to a sort of legal gambling, in which the party who has failed risks his money in a second and a third appeal, and so the case is carried from Court to Court until, perhaps, both the parties are exhausted. At present the litigant, even on a matter of procedure, may appeal from the master to the judge at chambers, and thence to the Divisional Court, and then to the Court of Appeal, and finally to the House of Lords. A great French jurist thought that there ought to be one appeal in order to allow of a rehearing before a different tribunal, but that there should be no further appeal, and in that view I entirely concur."

The Faribault (Minn.) *Democrat* recently contained an announcement of sheriff's sale on execution, wherein it was stated that the sheriff had levied upon the upper set of false teeth belonging to the defendant, and would sell the same to the highest bidder for cash. This might seem at first sight the sale of a necessary, like the debtor's bed or cooking stove. But it appears that there were circumstances of peculiar aggravation in the case. The plaintiff, a dentist, made the teeth to defendant's order. Then the defendant got possession of them by carrying them off from the dentist's office in his absence. Payment of the dentist's bill being

refused, suit to recover was entered, and the Court believing probably that it would be difficult to sell teeth still in the debtor's mouth, made an order supplementary to execution, that the defendant deliver the teeth to the sheriff. The defendant complied with this order, and thereupon the sheriff advertised the teeth for sale.

"Chaos is come again," according to an English writer, because counsel are advised to return fees which they cannot earn. It appears that recently a Queen's counsel who had received a brief was unable to attend the trial. The solicitor who instructed him, at the suggestion of the client, asked for a return of the fee. The learned counsel replied that he would be happy to do so if he could find any precedent. The Attorney-General being consulted, stated that in his opinion the right course was to "return so much of the brief fee as exceeds the amount which would have been proper if the brief had been simply a case for opinion." Even this seems to us too favorable a position for the barrister, for (1) he charges for a service which the client did not require except as a preliminary to advocacy; (2) he sets his own price upon such service. The mere fact of a counsel examining papers does the party no good, if he is afterwards obliged to place the case in the hands of another. However, even the Attorney-General's rule, according to the *Law Journal*, "would have made old-fashioned practitioners stare and gasp," and another authority says "chaos is come again." The only argument we see urged against a return of fees is that counsel will no longer trouble themselves to attend if they wish to be elsewhere, and they can salve their conscience by returning the fee. But the withdrawal of counsel at the eleventh hour would often be a matter of such serious moment to the client that the return of fees would be a poor compensation. The obligation to attend is as sacred as ever. The return of fees is simply a matter of honesty, which forbids a lawyer to keep money which he has not earned nor tried to earn, and which the client frequently can ill afford to pay a second time.

TRIBUNAL CIVIL DE LOCHES (France).

Juin 1885.

SIEUR H.... v. SIEUR L....

Chiens de chasse s'introduisant dans une propriété close—Droit du propriétaire du domaine.

Des chiens de chasse, la propriété de H., étant entrés sur des terrains appartenant à L., ce dernier, qui avait déjà averti H. et lui avait même fait défense de laisser venir ses chiens sur son domaine, tira sur eux, en tua un et en blessa un autre.

H. poursuivit L. pour 400 francs de dommages.

JUGÉ: Que, quoique en règle générale, un propriétaire n'ait pas le droit de tuer, sans un motif sérieux de légitime défense, les animaux domestiques d'autrui qui pénètrent sur sa propriété, néanmoins, dans l'espèce, où la défense préalable, le fait que le propriétaire conduisait ses chiens du côté où était située la propriété du défendeur, ce qui fournit aux chiens l'occasion de retourner sur le terrain du demandeur, était une provocation suffisante pour mettre le défendeur en légitime défense, et enlever au demandeur tout recours en dommage.

Le 17 octobre dernier, un chien et une chienne de chasse appartenant au sieur H.... étaient entrés dans un enclos faisant partie d'un domaine dont le sieur L.... était propriétaire. Ce dernier d'un coup de fusil tua la chienne de H.... et d'un autre coup blessa le chien. H.... a introduit devant le tribunal civil de Loches (Haute-Loire) une demande en payement de 400 francs à titre de dommages-intérêts.

Le tribunal a rendu le jugement suivant :

" Attendu qu'en égard aux circonstances dans lesquelles le fait s'est produit, la demande d'H.... n'est pas justifiée; qu'en général, sans doute, on ne saurait prétendre qu'un propriétaire ait le droit de tuer, sans un motif sérieux de légitime défense les animaux domestiques d'autrui qui pénètrent sur sa propriété; mais que, dans la cause, un tel motif peut seulement être allégué par le défendeur;

" Attendu, en effet, que L.... se plaignait à tort ou à raison, que les chiens d'H.... chassaient souvent dans son enclos, avait, le 16 octobre, c'est-à-dire la veille du fait objet

du procès, à Cormery, signifié à H.... l'interdiction absolue de continuer à faire chasser ses chiens dans cet enclos, en ajoutant que si ces animaux pénétraient encore chez lui, il les tuerait;

" Que, sans prendre cette défense au sérieux, ni s'en préoccuper, H.... ayant répondu à L.... qu'il serait le lendemain de ce côté, et de bonne heure, que le propriétaire de Long-Pont ne serait pas encore levé; attendu que dès le lendemain matin, en effet, et comme il l'avait annoncé, H...., accompagné de ses deux chiens, allait passer tout en chassant dans des taillis qui ne sont séparés que par un chemin de l'enclos de L....;

" Attendu que ses chiens étant entrés une première fois dans cet enclos, il est vrai qu'il les rappela; mais que bientôt ces animaux y rentrèrent, soit ensemble, soit isolément, et qu'alors ils furent l'un blessé, l'autre tué par le défendeur;

" Attendu qu'après les paroles échangées la veille avec L.... à Cormery, H.... commettait une véritable imprudence en allant ainsi passer près de l'enclos de Long-Pont avec deux chiens en liberté, lesquels, tout en battant les taillis voisins, ne pouvaient en quelque sorte manquer d'entrer dans cet enclos; que cette imprudence s'est accentuée encore, lorsque s'apercevant une première fois que ses chiens étaient entrés chez L.... et les ayant rappelés, il a négligé de les maintenir auprès de lui, comme cela lui était très facile, jusqu'à ce qu'il se trouvât à une distance suffisante pour que ces animaux ne pussent plus être entraînées à pénétrer dans l'enceinte interdite;

" Attendu qu'en admettant, ce qui est invraisemblable, qu'il n'y ait eu ici qu'une simple négligence et absence complète de toute pensée agressive, il n'en est pas moins vrai qu'ainsi que l'avait déjà jugé le jugement correctionnel du 21 février dernier, " dans l'état des rapports des parties, l'entrée " même toute fortuite, et sans aucune participation de leur maître, des chiens d'H.... " dans l'enclos de L.... pouvait paraître à " celui-ci la manifestation d'une intention " blessante et comme une provocation."

" Attendu, qu'en cet état, le fait par L.... d'avoir tué l'un des chiens d'H.... et blessé l'autre, alors que ces deux chiens obéissant

à leur instinct se trouvaient ou pénétraient dans son enclos pour y chasser, et par conséquent, lui causaient à ce point de vue un préjudice, ne constitue de sa part que l'exercice rigoureux assurément, mais toutefois légitime, du droit de défense, et ne saurait, par conséquent, être considéré comme une faute pouvant donner lieu à des dommages-intérêts.

"Par ces motifs:

"Déclare H... mal fondé dans sa demande, l'en déboute, et le condamne aux dépens."—
(Rapport de M^{re} Louis Albert, *Journal de Paris*.)

(J. J. B.)

THE ADMINISTRATION OF JUSTICE.

[Continued from p. 288.]

The preparation of the record for re-examination is often made a serious affair, and takes no inconsiderable time. Why it should be not apparent. All that is needed is a transcript of such part of the record as is necessary for re-examination.

The question of appeal is always a serious one. How many successive appeals should be allowed, and within what time should they be taken? The answer to the first depends upon the organization of the courts. In the State of New York, for instance, where there are upwards of seventy co-ordinate trial courts of the highest original jurisdiction, it would be out of the question to give an appeal from each of them to the Court of Appeals; there must, of necessity, be a previous sifting of the case by a proceeding in the nature of an appeal in the original court itself; that is, an appeal from one judge to two or three co-ordinate judges. In other States the same reasoning may not apply, and one appeal may suffice. The time allowed for an appeal should be short. It is now in many instances long, grievously long indeed; a year, two years, sometimes six or seven.

The formality of appealing should be as simple as possible; nothing should be required but a notice that a party does appeal, a transmission to the appellate court of a copy of the record and security to abide the judgment, unless the suggestion hereafter

made should be adopted, requiring a brief of the objections to the judgment appealed against to be filed with the notice of appeal. The problem is how to facilitate the hearing and decision when the record has reached the higher court. To solve it we must compare the work to be done with the workmen who are to do it; in other words, measure the workmen with the work. We must have skilled workmen, no doubt of that, or the work cannot be done; that is, it cannot be done to answer the purpose of the work, which is the same thing as saying that it cannot be done at all. We know how many hours there are in a day, and how many of these hours a man with a sound mind in a sound body can devote to work. We must put upon him therefore no more than he can do, for then the work will not be done. It is true that one man's rights are as sacred as another's; but it does not thence follow that a little case should go to the highest court, if a great one does. We have courts for small causes, and nobody is foolish enough to think that the costly machinery of the higher courts should be used for them. We make as many Courts of Appeals as the people of each community think expedient; some more, some less. Nobody dreams that we should go on multiplying appellate courts so long as any suitor wishes to try his hand again. There must be a limit to litigation, and that may be reached by limiting the causes that are to go to the Courts of Appeal, or increasing the judicial force, which is to take hold of them, and put an end to them.

The Supreme Court of the United States can hear and decide four hundred cases in a year and no more. It is folly then, it is grossly unjust, to send to it more than that number of cases. Where, it may be asked, shall the line be drawn? That depends upon the ability of the judges for the time being to hear and decide promptly. It was drawn through one point a century ago, it may be drawn through another to-day and through another a quarter of a century hence, according to the number of cases in the lower courts. When the government was founded appeals were allowed according to the supposed needs of suitors of that day, but the hundred years since have so increased litigation that

the privilege of appeal must be more restricted than it is. There may be and there should be as many intermediate appellate courts as the interests of suitors require. Certain cases there are in which the Supreme Court has, by the Constitution, original jurisdiction, and therefore the appellate jurisdiction must be so limited as not to embrace, counting in the original cases, more than four hundred in all. In selecting these, the interpretation of the Federal Constitution and laws should be the chief object. Not a single question of fact should go up in any case whatever. And what is here said of the Supreme Federal Court applies with equal force to the highest appellate courts of the States. It may be well also to observe here that the labors of all appellate judges would be much relieved, if a brief statement of the objections to the judgment were required to be filed with the clerk at the time of appeal.

The foregoing observations respecting the Supreme Court of the United States lead us naturally to the other Federal Courts. The delay there is often greater than in the State courts. Federal legislation has tended latterly towards enlarging the jurisdiction and increasing the labor of the Federal judges. Whether this be wise or unwise it is not within the province of this report to discuss. But it is appropriate to the discussion to say, that in our judgment, the practice in the Federal courts within a State should be made to conform to that of the State courts, for the reason that the people and the profession should be saved the time and the trouble of studying and practicing two systems. The act of Congress of June, 1872, requires this conformity in respect of legal actions, but leaves the equitable ones to be governed by the rules framed by the Supreme Court judges. We think that the practice in the latter class of cases should be conformed so far as it may constitutionally be done to that of the State courts, in respect of equitable as well as legal actions; and furthermore, that whenever in any State the two classes are merged in one they should be merged in the same way in the Federal courts. It has been suggested, and with much force, that there should be a Code of Procedure, civil and criminal, enacted by Congress for all the Federal courts in all

the States. If there were reason to hope that the adoption of such a Code, simple and direct, without unnecessary details, would lead to the adoption of one like it in the States, we should think it very desirable. But until then we think that the entire conformity of Federal to State procedure in all actions is greatly to be desired. In respect of substantive law, we think also that the act of Congress, which provided so long ago as 1789 that the laws of the several States should be rules of decision in trials at common law in the Federal courts, should be made applicable to all trials and to embrace all law not purely Federal.

The statistics of business in the Federal courts show that many of the districts are so greatly in arrear that there is a practical denial of justice. How these courts should be reconstituted we do not inquire further than to call attention to the principles we have elsewhere discussed, and to add that we think an appeal should be provided against every judgment rendered by a single Federal judge to two or more judges holding an intermediate court.

We ought not to omit mention of the courts in the District of Columbia. They are specially important because they have close relations with the administration of the Federal government. It is enough however to say here that the judicial administration of the District violates almost every principle that we have been endeavoring to establish. The courts are badly organized, their procedure is faulty, and the substantive law is uncertain and confused beyond that of any other community in the United States. Of twelve appeals in the highest court in the District, decided by the Supreme Court of the United States during the last term, seven resulted in reversals, four in affirmances, and one was dismissed.

We have so far considered only the proceedings in a law-suit of a civil character, and have paid no attention to criminal proceedings. They scarcely need special mention. The principles discussed as applicable to civil suits will apply generally to criminal ones. One measure however we recommend, and that is the appointment of a public defender wherever there is a public prosecutor.

The innocent are liable to suffer, and do often suffer for want of proper advice and defence, especially when first arrested. It can hardly be disputed that to prevent abuse of its own processes the State should be a "helper of the helpless." Of course the office should be so guarded as not to interfere with the right of the accused to choose his own defender if he will.

The uncertainty of judicial administration arises from one of three causes; the mistake of the judge as to law or his mistake as to fact, or the uncertainty of the law itself. There may be no rule of law to fit the case, or there may be one and the judge ignorant of it. A mistake of fact there is no remedy for, except by procuring the best persons to decide, be they well-trained judges or intelligent jurors. A plaintiff often begins a lawsuit, or his adversary defends it, with prejudices derived from a one-sided view of the facts. Thus it often happens that a party does not know the whole case, because he sees only his side of it. It is only when both sides are heard and their evidence produced, that the whole case is known. This is not a fault, but a benefit of the lawsuit, as it develops all the circumstances, and thus enables the judge, jury and party to see the facts as they are. We need not however dwell on this cause of uncertainty. Our concern now is with the mistakes of law made by the judges and the uncertainty of the law itself. Supposing the law to be certain and easily known, the mistakes of the judges are the mistakes of ignorance, for which there is no cure but in the substitution of capable for incapable judges. By so much as a competent judge is a blessing, by so much is an incompetent one a scourge. The one is learned, courteous, patient, firm, quick to discern and prompt to decide; the other is ignorant, rude, impatient, infirm of purpose, dull and dilatory. Both may be honest in the sense of intending no wrong, but the difference between them is that one is in his right place and the other is out of his place altogether.

The only remaining element of certainty or uncertainty is the character of the law itself, as it is certain or uncertain. Now the state of the law we pronounce to be one of

the greatest uncertainty. Did we not see many men of fair learning and intelligence affirm the contrary we should say that all men believed it and all men knew it. This uncertainty comes in a great degree from the nature of the sources whence the law is derived; it is made by the judiciary and not by the Legislature; made to fit particular cases, and not by general rules, and made always after the fact. It will not answer the objection to say that the Legislature makes bad laws sometimes. So does the judiciary. But the former need not make bad laws. If it be not able to make good laws for the future conduct of the citizen, leaving the judiciary to enforce them, still less is the judiciary able to make and enforce good laws for the past conduct of the citizen. We say a hundred times a day that we are governed by the common law. Where do we find this common law? The notion that it is found in usage or tradition we know in this young country to be untrue. Nothing here dwells in tradition; nothing in usage. The notion that common law is something floating in the atmosphere, visible only to the initiated, is one of those mythical phantasms which serve to amuse and deceive indolent credulity. Where then is this common law to be found? In the decisions of the judges, and there only. What judges? All the judges of the English speaking peoples—American, English, Irish, Scotch, and the English provinces all over the world—seventy or more distinct communities in all—with distinct judicial establishments. How many of these decisions are yearly made and reported? About 16,000 in this country alone. Are they announced in the form of legal propositions or precepts? By no means. They are the conclusions upon law and fact of legal controversies brought before different judges in different forms, argued on each side by different counsel, and reported by different reporters. Is there any guaranty of the accuracy of these reports? None but this: that they are generally made by official reporters, who gather as they may the facts out of documents, long or short, and masses of statement, large or small, and follow them with opinions as they are written by the judges, which opinions are sometimes dissertations

upon topics relevant or irrelevant according to the wisdom or unwisdom of the writer. Is this an imaginary picture? Let the facts stated in the beginning of this report answer.

We can imagine a primitive society in which a king and his judges were the only magistrates. They had made no laws. The judges decided each controversy as it arose, and by degrees what had been once decided came to be followed, and so there grew up a system of precedents, by the aid of which succeeding cases were decided. Hence came judge-made law. But could any sane man suppose that this was a scheme of government to be kept up when legislatures came in?

The difference between judge-made law and jurisprudence founded upon statutes is as wide as the poles. The true function of the Legislature is to make the law; the true function of the judge is to expound it. But because language is at best an imperfect expression of intention, and sometimes susceptible of more than one interpretation, and the courts are now and then obliged to choose between different interpretations, it does not follow that the function of interpretation is to be enlarged into the function of legislation. The separation of the two is in theory assumed, and in constitutions declared, however the theory may be contradicted and the Constitution ignored in practice.

Jurisprudence is not the making of law, but the application of it; this application belongs to the courts. The Constitution of the United States was not made by the judges; they expound it, and generally in the exposition other courts will follow the Supreme Court; but the Supreme Court has not always followed itself, that is to say, it does not always adhere to its own precedents; the executive and legislative departments do not feel bound to follow it; nobody, in any department or court, would now follow the *Dred Scott* case, and there are many who would not follow the late legal tender exposition of the Constitution.

Jurisprudence is not retroactive. The statute is there; everybody may read it for himself; if he thinks it means something different from what the courts think, he takes the risk of that; such a risk is inseparable from

the use of language. In construing the meaning of a statute the courts in no sense make the law; they only interpret.

Law libraries hold two classes of books, one large and one small; the latter contains the statutes. In the oldest of the States the statute books may number over a hundred. In New York there are one hundred and twenty-five. How many other law books are there? From ten to fifty thousand. The law not contained in the statute was made by the judges. For this reason it is called judge-made law; sometimes it is also called case-law, and sometimes the law of precedents. The last is the best name for it.

It may be asked: Can judge-made law be eliminated from our legal system altogether, as if the answer could affect the question of codification? It could not indeed affect it, because partial elimination may be better than none at all. But it is quite possible to eliminate judge-made law from our system; that is to say, every general rule of the law can be reduced to a statutory form; not all at once perhaps, but by degrees; that is, a great part now and the rest hereafter. Under such a code precedent ceases to be law, and becomes a guide. Exposition is not in any just sense judge-made law; in fact it is not law at all. If in the process of exposition the inferior court follows the superior, it yields to authority; if one co-ordinate court follows another it defers to another's judgment in cases where opinions may differ; if, however, the previous judgment is clearly in conflict with the enactment, the former must give way, for the reason that the enactment is the paramount authority.

Two questions are sometimes asked in respect of a code:

1. How will the judges decide if they find no provision of the Code to guide them? and

2. How will they decide if they find no provision of the Code, and no precedent?

The answer to each is easy:

1. If they find no statutory provision and a precedent, they will decide according to the precedent.

2. If they find no statute and no precedent they will decide, as they would now decide in the same circumstances, that is, upon the

nearest analogy to an established rule, or according to the dictates of natural justice; or they may possibly leave the case undecided, as Lord Mansfield did in *King v. Hay*.

There is still another question: Will not one court, in construing a provision of the Code, follow a construction already given by another? In other words, will not the courts thus make a law unto themselves by adhering to the principle of the following adjudged cases? The answer has already been given, and we will add that, so fast as concurring precedents accumulate in sufficient numbers the Legislature may add more provisions to the Code; so that in fact the Code will keep expanding as the people and their business expand. We shall meantime have gained this inestimable advantage: The rules already accepted will for the time being be collected, classified and arranged, inconsistencies will be reconciled, bad precedents will be discarded, good ones established, and, above all, the people will be able to see the law for themselves. We shall have firm ground somewhere; whereas, now the law of precedents is not and cannot be known generally by the people; nor can it be known with certainty by even the lawyers and the judges, to say nothing of the time wasted in searching innumerable precedents.

[To be continued.]

THE LATE HON. T. J. J. LORANGER.

The Hon. T. J. J. Loranger died somewhat suddenly, on the Island of Orleans, on the 18th August. *La Minerve*, in a notice of deceased, says:—

“ M. Loranger fut une personnalité dans notre politique et au barreau. Tout le monde regrettera sa perte.

“ Il naquit à Yamachiche, le 2 février 1823, et est le frère aîné de M. J. M. Loranger, conseil de la reine, et de l'honorable Louis Onésime Loranger, juge de la Cour Supérieure. Il fit ses études au collège de Nicolet, où il se distingua par ses talents remarquables. Il étudia le droit sous M. Antoine Polette, avocat des Trois-Rivières, qui devint plus tard juge de la Cour Supérieure, maintenant en retraite. Il fut admis à la pratique du droit, à Montréal, le 3 mai 1844, et nommé conseil de la reine, le 26 décembre 1854.

“ Il épousa en 1850, mademoiselle Sarah Angélique Trudeau, nièce de feu le grand vicaire Trudeau. M. Loranger eut de cette union une enfant, mademoiselle Alexina, femme de M. Henri Archambault, avocat. Il eut la douleur de perdre sa femme en 1858. En 1860, il épousa en seconde nocces mademoiselle Zélie-Angélique Borne, petite-fille du regretté M. Aubert de Gaspé.

“ Devenu l'associé de M. Drummond, qui fut fait, lui aussi, juge, M. Loranger ne tarda pas à se créer une très haute position au barreau, surtout comme criminaliste. Durant plusieurs années, il s'occupa activement de politique et se distingua éminemment à la législature des Canadas-Unis. Elu en 1854 député du comté de Laprairie, il fut secrétaire-provincial sous l'administration Macdonald-Cartier.

“ M. Loranger a été nommé juge le 28 février 1863 et a occupé cette position jusqu'en 1879, époque où il prit sa retraite. Il a agi très souvent comme assistant-juge de la cour d'appel, et en 1855, alors qu'il était encore bien jeune, il a représenté la Couronne devant la cour seigneuriale où il se fit remarquer d'une manière spéciale. Le juge T. J. J. Loranger, durant tout le temps qu'il a administré la justice, a fait preuve d'un talent et d'une science qui se rencontrent rarement. Il était professeur de droit administratif à l'Université Laval, qui lui a conféré le degré de docteur en droit. Il a été chargé de la codification des lois provinciales, et son érudition a rendu au pays des services dont tous les législateurs de l'avenir seront heureux de tirer profit. Il a écrit un commentaire sur le Code Civil—dont deux volumes ont déjà paru—qui n'aurait pu manquer de le placer au premier rang de ceux qui ont écrit sur notre jurisprudence. Ses lettres sur l'interprétation de la constitution fédérale sont en grande estime dans le monde légal. Président de la société Saint-Jean-Baptiste, il a travaillé, lors de la célébration de la grande fête de 1884, avec toute l'ardeur d'un jeune homme enthousiaste, pour célébrer dignement les nocces d'or de cette société.

“ Le juge Loranger demeurait à Sainte-Pétronille, Ile d'Orléans, avec sa famille, depuis le commencement du mois de juin, où il suivait un traitement spécial, pour soigner une

angine pectorale dont il souffrait depuis un mois. Depuis quelques jours, il s'affaiblissait beaucoup et avait beaucoup maigri. M. Loranger était toujours sur le point de partir pour la France afin de rétablir sa santé, mais il retardait constamment ce voyage, malgré l'avis de ses médecins, et travaillait à la codification des statuts."

GENERAL NOTES.

EXCOMMUNICATION CASE.—The Rev. Coker Adams, Rector of Soham Toney, has excommunicated Mr. Payne, a farmer, eighty-two years of age. Mr. Payne does not attend Church, and, it is said, has refused the clergyman admission to his house. A letter was written threatening to excommunicate him, but Mr. Payne, not understanding the process, wrote to inquire whether any part of the last half year's tithe had accidentally remained unpaid. He received the following reply: "Sir,—My letter of last Sunday was not written in consequence of any personal matter. You have, as you truly say, always paid me my dues. I wrote to remind you that you had persistently neglected to attend the Church's services and refused to receive her ministers, and that I should therefore feel it my painful duty to pronounce you out off from the Church's communion and membership. The wish I express at the end of my letter was quite sincere and remains unaltered still. —Yours faithfully, COKER ADAMS." The wish referred to in the first letter was that the rector prayed God to change Payne's heart and save his soul. When the sentence was pronounced the whole congregation was taken by surprise. Just before the sermon the rev. gentleman said, 'In the name of God, &c.' making use of the entire form of excommunication, which is generally believed to be obsolete. Mr. Payne seemed unmoved by the proceeding. —*Law Journal* (London).

THE FIRST LAWYER IN BOSTON.—Almost two and a half centuries ago, Thomas Lechford, who had been bred at the English bar, came to Boston to practice his profession. He was the first professional lawyer in the colony. He remained here three or four years, when he was glad to return to London and the more congenial haunts of Clement's Inn. Not very much is known of his doings here, except that in 1639 he was disbarred on a charge of going to the jury and pleading with them out of Court. He was at the same time admonished not to meddle with Court business unless he should be called upon by the Courts. The next year he was again taken to task for his officiousness towards the Courts, and he promised not to meddle in future. In 1642, after his return to England, he published his 'Plain Dealing, or News from New England.' It is apparent from this book that the ground of his trouble with the Courts was that he was trying to set up the common law, while the Puritan Courts cared nothing at all for the common law, but were trying to set up, especially in criminal matters, the Mosaic law. Lechford tells us that the Governor gave the charge to the grand juries 'under the heads of the Ten Commandments.' Long after Lechford was driven from Boston came the witchcraft trials, and there was not even then

any lawyer to preside upon the bench, or to defend the accused at the bar. There was no use for lawyers learned in the common law, 'the perfection of common sense,' while ministers in the pulpit and on the bench proclaimed a law that was made up more of superstition than of sense. Now the Puritan ministers have gone; no place in the wide land is more free from the taint of the religion that in early days was the law as well. The lawyers have come; there are now about fourteen hundred of these ministers of a new civilization in Boston. Thomas Lechford, while there, kept a note-book in which he entered a memorandum of the cases that he conducted, the papers that he drew up, and the pay that he received. The American Antiquarian Society is about to publish it. It will be entertaining now. —*American Law Review*.

THE FRIEND OF MAN.—Courts have leaned so far in favor of the assured in the interpretation of insurance contracts, that we are not surprised at the ingenuity of counsel in the case of *The Trojan Mining Company v. The Fireman Insurance Company*, decided by the Supreme Court of California, May, 1885, in claiming that because a watchdog was kept in the building insured, while the watchman slept in another building across the road, and distant about one hundred feet, there was no breach of the condition of the policy which required the assured to employ a watchman to be in and upon the premises night and day while the same were idle. It also appears from the evidence that it was shown that the dog 'had the whole range of the building on the inside, and was accustomed to bark loudly when any stranger approached the building.' But this also failed to prevail with the Court, and for once at least an insurance company secured a victory: but it shows what a narrow escape it had from losing the case from the 'bark of a dog.' —*American Law Record*.

THE PRIVILEGES OF A FOREIGN ATTACHÉ.—At the Westminster County Court, on July 20, before Judge Bayley, an action brought by Mr. George T. Parkinson, of Bath, to recover from Henry A. Potter, of Hampstead, the sum of 37l. 19s. in respect of rates paid in the parish of Marylebone, was heard. It appeared that the plaintiff was the freeholder of 1 Blanford Square, and the defendant formerly held the lease. In 1883 the lease of the house was assigned to Senor Pinto Basto, at that time Portuguese consul-general, with offices at 1 Throgmorton Street, City, and attached to the Portuguese Legation at 12 Gloucester Place, Portman Square. In the meantime an application was made for payment of parochial rates, and these not being forthcoming from the occupier were eventually paid by the plaintiff, who now sought to recover them from the defendant, who in taking the house agreed to pay the rates. The defendant's counsel urged that Senor Basto, who was the proper person to pay the rates, was not privileged from arrest under the Act. It was contended that he could not claim exemption as consul-general, and that his connection with the embassy was an honorary one and not of a nature entitling him to the privileges allowed to ambassadors and their servants by this country. After a lengthened argument, his Honor held that Senor Basto, as an attaché to the embassy, was privileged, and gave judgment for the plaintiff accordingly.

The Legal News.

VOL. VIII. SEPTEMBER 19, 1885. No. 38.

A decision of considerable interest is that which has been delivered by the Judicial Committee of the Privy Council in the case of *Prévost & La Compagnie de Fives-Lille*. The purchaser of a property at sheriff's sale refused to pay the price, because he found that the customs duties upon certain machinery incorporated with the building had not been paid, and that the Crown had then actual possession of the property, and asserted a preferential claim for the duties. The *adjudicataire* petitioned to set aside the *décret*. The courts in Montreal refused this petition, and held that the *adjudicataire* was liable to *folle enchère* for non-payment of the price. The Court of Queen's Bench declared that the property was freed from the Crown claim by the sheriff's sale, and that the *adjudicataire* had a clear title. The Judicial Committee do not decide whether a sheriff's sale purges a Crown claim or not. But they decide that the purchaser is not bound to take property which is actually held by a third party under a legal writ, and that unless the purchaser is put in possession he is not bound to pay the price. This seems to be a reasonable view of the purchaser's position, especially if the sheriff's sale does not discharge the property from a Crown claim; C. C. P. 714, s. 2.

The Lord Mayor of London, whose experience goes back thirty-five years or more, declared recently that the thoroughfares of the metropolis have within the last six weeks been flooded with obscenity to an extent unparalleled in his observation during that period. "The result," he added, "was that things had got to a sad pitch, and some strong action was necessary." Another magistrate of experience has also testified to the deplorable effects of *Poll Mall Gazette* literature and its imitations. It is worth while noting these expressions of experienced observers as opposed to the judgment of a

person like Mr. Stead, who, it seems, had never been inside the doors of a police court in his life.

The fifth annual report for 1884 of the inspector of retreats under the English Habitual Drunkards' Act, 1879, shows that five such retreats have been licensed under the Act. Accommodation is provided for sixty-two licensed patients. There were seventy-two patients admitted during the year, sixty-two of whom were discharged. The inspector thinks that, as a rule, the retreats have worked well. Of twenty-five cases of inebriety specially investigated the education of all was fairly good, in four cases marked "college," and the social position that of a gentleman. Thirteen were married, one a widower, and the rest single. In reply to the question what kind of liquor the patient has been most addicted to, one unprejudiced gentleman, who has had *delirium tremens* five times, answers "all sorts."

PRIVY COUNCIL.

LONDON, July 18, 1885.

Coram LORD WATSON, LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR RICHARD COUCH.

PRÉVOST (*adjudicataire* et requérant en nullité de décret), Appellant, and LA COMPAGNIE DE FIVES-LILLE (plaintiff), Respondent, and Atty.-Gen., Intervenant.

Rights of the Crown—Customs duties—Sheriff's sale—Rights of adjudicataire—Folle enchère.

Held—That the *adjudicataire* of an immoveable at sheriff's sale is entitled to have the sale set aside where it appears that the Crown asserts a preferential claim upon machinery contained in the building and incorporated therewith, and that the property is under seizure at the instance of the Crown by virtue of a writ of assistance. The *adjudicataire* is entitled to delivery of the thing purchased, and even if the claim upon the property may ultimately prove unfounded, he is not obliged at his own expense to remove the hindrance to his possession.

The judgment of the Judicial Committee reversed a judgment of the Court of Queen's

Bench, Montreal, January 23, 1884, (Dorion, C. J., Monk, Tessier, Cross and Baby, JJ.) In rendering the judgment at Montreal, Dorion, C. J., observed :—

La compagnie de Fives-Lille, ayant obtenu jugement contre l'Union Sucrière Franco-Canadienne, fit saisir ses usines pour manifac-turer du sucre de betterave dans la ville de Berthier. Les usines furent adjugées, le 28 août 1882, à l'appelant, pour la somme de \$76,000.

L'appelant ayant refusé de payer le prix d'acquisition, la compagnie de Fives-Lille a demandé un bref de *venditioni exponas* pour faire vendre la propriété saisie à la folle enchère de l'appelant. De son côté l'appelant a demandé la nullité du décret, en se fondant sur ce que depuis la vente qui lui avait été faite, le gouvernement de la Puissance avait fait saisir les ustensiles formant partie des usines qui lui avaient été adjugées et qu'il n'en pouvait avoir la possession.

En réponse à la demande de la compagnie de Fives-Lille pour folle enchère, l'appelant a opposé les moyens invoqués dans sa requête en nullité de décret et, de plus, que la couronne avait un privilège sur les immeubles décrétés, qui n'avait pas été purgé par le décret.

La demande pour folle enchère et la demande en nullité de décret ayant été réunies, la cour de première instance a jugé que le décret avait purgé les droits de la Couronne, et que rien ne pouvait empêcher l'appelant de se faire mettre en possession des immeubles vendus, en par lui payant son prix d'adjudication.

Sur l'appel, le procureur-général, Sir Alex. Campbell, a demandé à ce qu'il lui fût permis d'intervenir pour protéger les droits de la Couronne, et il a conclu à ce que le jugement qui ordonnait la vente des usines en question à la folle enchère de l'appelant fût mis de côté, et à ce qu'il fût déclaré que la Couronne avait droit de retenir les usines en question jusqu'à ce qu'elle eût été payée des droits d'importation, se montant à \$22,000, dus sur les ustensiles servant à la manufacture des sucres que l'on fabrique dans les usines adjugées à l'appelant.

La cour a permis au procureur-général d'intervenir dans la cause, en se fondant sur l'ar-

ticle 1166 du Code de Procédure Civile qui, en termes exprès, autorise la cour à permettre à une partie intéressée d'intervenir dans une cause en appel, comme elle l'a déjà permis dans la cause *Mechanics Bank & St. Jean, & Wylie*, intvt., rapportée au vol. 2 *Legal News*, p. 315.

Sur le mérite des contestations tant entre l'appelant Prévost, qu'entre le procureur-général et la Compagnie de Fives-Lille, il s'agit de savoir quel a été l'effet de la vente faite par le shérif le 28 août 1882. L'appelant prétend qu'il est exposé à être évincé par la Couronne d'une partie notable de la propriété qu'il a achetée du shérif et que, de fait, il ne peut en être mis en possession; de son côté, la Couronne prétend qu'elle a fait saisir, comme elle en avait le droit, les ustensiles importés par l'Union Sucrière de Berthier, et sur lesquels les droits d'importation n'ont pas été payés. La Compagnie de Fives-Lille répond à cela, que c'est avec la permission de la Couronne que les ustensiles ont été livrés à l'Union Sucrière Franco-Canadienne et qu'ils ont été placés dans les usines de la compagnie; que la Couronne n'ayant pas fait d'opposition à la vente des usines ses droits ont été purgés et qu'elle ne peut troubler l'appelant, qui s'est rendu adjudicataire des usines, y compris les ustensiles qui en font partie.

Il appert par la preuve et les admissions des parties que les ustensiles qui sont dans les usines de l'Union Sucrière de Berthier, ont été importés il y a quelques années, et que la Couronne a accordé à l'Union Sucrière deux ans pour payer les droits d'importation sur ces ustensiles, avec permission de s'en servir dans l'intervalle, la Couronne prenant, comme sûreté pour le paiement de ses droits, la garantie de M. Adolphe Masson, président de l'Union Sucrière, avec déclaration que ces ustensiles seraient considérés comme étant en entrepot dans les usines de la Compagnie. Ces ustensiles consistent dans des bouilloires et autres objets, qui ont été incorporés aux usines et en font partie.

La vente a eu lieu le 28 août 1882, sans que la Couronne ait fait aucune opposition à la vente, soit afin de distraire ou afin de charge, quoiqu'il appert qu'elle ait été informée par M. Masson lui-même, que la vente devait avoir lieu. Le lendemain seulement de la vente, c'est-à-dire le 29 août 1882, le

nommé J. Bte. Coallier, agissant d'après les instructions de John Lewis, député collecteur des douanes de Montréal, se rendit sur les lieux pour saisir et saisit tous les ustensiles contenus dans les usines. Cette saisie a eu lieu, paraît-il, en vertu d'un bref d'assistance. Tout cela n'est prouvé que par le témoignage de Coallier et de Pierre Tellier, qui a été nommé gardien à cette saisie.

Il est constant que la vente par le shérif purge toutes les réclamations que des tiers peuvent avoir contre des propriétés vendues, et transmet à l'adjudicataire, en par lui payant son prix d'adjudication, tous les droits de propriété du débiteur sur qui la vente a lieu. Telles sont les dispositions de l'art. 598, C.P.C., qui a rapport à la vente des meubles, et des articles 706 et 711, même code, qui ont rapport à la vente des immeubles. Ces dispositions affectent aussi bien la Couronne que les particuliers. La Couronne, qui a des droits à faire valoir devant les cours de justice, est tenue à faire valoir ces droits en la forme indiquée par le Code de Procédure Civile et, à défaut de le faire, elle peut être privée de ses droits comme tout autre intéressé. Cette règle a été reconnue en principe dans deux causes: *Attorney General & Black*, Stuart's Rep. 325, et dans celle de *Mont & Ousmet*, 19 L.C.J. 71. La Couronne aurait donc dû faire une opposition afin de distraire en vertu de l'art. 658 C.P.C., et à défaut de le faire, elle a perdu le droit de s'opposer à la vente des ustensiles sur lesquels elle réclame un privilège.

Il est vrai que l'on a produit dans la cause une lettre du 26 août 1882, adressée par l'assistant collecteur des douanes au shérif du district de Richelieu dans les termes suivants:—

"Sir, I beg leave to inform you that I am instructed by Customs Department to notify you, and have to request that you will be pleased to notify all concerned, or who, by virtue of a sale by you, may become interested, that the machinery and other articles in the Beet Root Sugar Refinery or Manufactory or the premises attached thereto, at Berthier, in the Province of Quebec, are held by the Crown, under bonds, for customs duties, and that if sold, it must be conditionally that said duties shall be paid before any of said

machinery are removed. I am, Sir, your obedient servant, John Lewis."

Cette lettre paraît avoir été remise au shérif avant la vente; mais comme elle n'était pas dans la forme d'une opposition afin de distraire, et après l'expiration des délais dans lesquels une semblable opposition aurait dû être faite, le shérif ne pouvait, sur un pareil document, suspendre la vente, et il s'est contenté de la rapporter avec son retour, sans suspendre ses procédés. La saisie avait été faite sur l'Union Sucrière, qui était en possession des usines et des ustensiles qu'elles contenaient, et rien ne pouvait arrêter les procédés du shérif, qu'une opposition régulière.

La vente, en ce qui regarde l'appelant, est donc valable et, aussitôt qu'il aura payé son prix d'adjudication, il pourra se mettre en possession des propriétés adjugées, et, en refusant de payer son prix, il s'expose à ce que la propriété soit vendue à sa folle enchère, en vertu de l'art. 690 C.P.C.

La Couronne a prétendu que l'adjudicataire, n'ayant pas payé son prix d'adjudication, la vente, d'après l'article 706 C.P.C., n'était pas parfaite et qu'elle était encore à temps de faire valoir ses privilèges sur les objets saisis; mais il faut observer que, lorsque l'art. 706 dit que l'adjudication n'est parfaite que par le paiement du prix de vente, cela veut dire que la vente n'est pas parfaite relativement à l'adjudicataire s'il n'a pas payé son prix, mais cet adjudicataire peut toujours demander à payer son prix de vente et être mis en possession de la propriété qui lui a été adjugée, tant que cette propriété n'a pas été revendue à sa folle enchère. *Nye v. Potter*, 5 L.C.J. 21).

De plus, après une première adjudication, nulle opposition afin de distraire ou afin d'annuler, qui aurait dû être faite avant cette adjudication, ne peut être reçue, (*Evans & Nichols et al.*, 1 L.C.R. 151; Art. 664, C.P.C. et causes citées sous cet article dans l'ouvrage de Foran, p. 350).

Nous sommes donc d'opinion que l'appel de l'adjudicataire est mal fondé, et que le jugement, qui ordonnait que la propriété soit revendue à sa folle enchère, est bien fondé.

Nous croyons, cependant, que le jugement de la Cour inférieure déclarant que la vente

du shérif a purgé les privilèges et hypothèques sur les immeubles vendus peut donner lieu à une fausse interprétation. Le décret n'a pas eu l'effet de faire perdre le privilège de la Couronne, qui ne consiste pas dans un droit de rétention, puisque la Couronne peut exercer son privilège sans avoir jamais eu la possession des articles sur lesquels les droits sont dus. Aussi nous croyons devoir déclarer, par le jugement que cette Cour est appelée à rendre, que le privilège que la Couronne avait pour être payée des droits d'importation qui lui sont dus n'existe plus sur les ustensiles même qui y étaient affectés, mais qu'il a été transféré sur la partie du prix de vente qui représente ces ustensiles, conformément à l'art. 729 du Code de Procédure Civile, et elle réserve à la Couronne de faire valoir ses droits sur ce prix lorsqu'il aura été payé, ou sur le prix qui proviendra de la vente qui sera faite à la folle enchère de l'appellant (2 Bourjon, 725). La réclamation de la Couronne n'est tout au plus que de \$22,000, et la propriété a été vendue \$76,000. La Couronne n'est donc pas exposée à perdre ses droits. Elle ne pouvait, dans tous les cas, pour être payée de sa créance que faire vendre les ustensiles pour lesquels les droits d'importation n'ont pas été payés, et la vente de l'usine entière doit assurer un meilleur prix que si les ustensiles sur lesquels la Couronne a un privilège étaient séparés de l'usine même. Le jugement que nous rendons assure les droits de tous les intéressés.

Quant au frais, la Cour croit que l'appellant, à raison des procédés adoptés par la Couronne, avait quelque raison de craindre d'être troublé et que son opposition n'était pas tout à fait futile. Si la Couronne était intervenue plus tôt pour faire valoir ses droits, les contestations qui ont eu lieu auraient été évitées. Nous pensons que les frais qu'elles ont occasionnés, tant sur la contestation en Cour inférieure que sur la contestation en Cour d'Appel, doivent être payées à même les deniers provenant du prix de vente, qui seront adjugés à la Couronne.

The following is the judgment of the Judicial Committee of the Privy Council :—

PER CURIAM. The respondents, La Compagnie de Fives-Lille, on the 25th May 1882,

recovered judgment in the Superior Court of Lower Canada against the Union Sucrière Franco-Canadienne, for \$33,293.69, with interest; and on the 10th June 1882, a writ of *fiat facias* was duly issued to the sheriff of the district of Richelieu, directing him to levy that sum upon the property, real and personal, of the judgment debtors. The sheriff, in execution of the writ, seized certain buildings, with the fixed machinery therein, belonging to the judgment debtors, which had been erected and used by them for the manufacture of beet-root sugar, situated in the parish of Berthier and district of Richelieu, and advertised the same for sale, as an *immeuble*, upon the 28th August 1882.

On the morning of the day of sale, John Lewis, an officer of the customs at Montreal, intimated to the sheriff, by letter, that the fixed machinery of the sugar factory was held by the Crown, under bond, for unpaid import duties, and could not be sold, unless subject to the condition that these duties were to be paid before any part of the machinery was removed from the premises. The claim thus asserted on behalf of the Crown became known to the appellant, Arthur Prévost, as well as to many other persons, who attended, on the 28th August 1882, for the purpose of bidding at the sale. Accordingly, the appellant Prévost, before the bidding commenced, asked the sheriff whether the property was to be sold free of all charges, to which the sheriff answered, "Yes." The bidding then went on; and eventually the property was knocked down, and adjudicated to the appellant, at the price of \$76,000. That the sale was conducted, and the purchase made by the appellant, on the distinct footing that the property was sold free of all charges, is made perfectly clear by the return of the sheriff, in which he expressly states that he disregarded the intimation given to him by Lewis, being of opinion that he had no authority to give effect to the condition which the Crown sought to impose.

On the 29th August 1882, the day after the sale, the customs' authorities acting in virtue of a formal *bref d'assistance*, seized the whole machinery in the sugar factory, and placed it under the charge of one of their officers. Thenceforth, the machinery remained in the

custody and possession of the Crown authorities, who refused to give delivery, or to allow delivery to be made to any one, until the whole import duties chargeable in respect of the machinery were paid, although they expressed their willingness to give access to the machinery for the purpose of cleaning and preserving it. They alleged that the factory had been duly constituted a customs or bonded warehouse, for the safe-keeping of the machinery, by an Act of the Governor in Council, in terms of the Dominion Customs Act, 40 Vict. cap. 10; that the sale, so far as regarded the machinery, was void, inasmuch as it was in the possession of the Crown, and not of the judgment debtors; and, at all events, that so long as it remained in the factory, which had been constituted a warehouse within the meaning of the Customs Act, no sale by the sheriff could defeat the right of the Crown to retain the custody of the machinery until the import duties were paid.

In terms of Article 687 of the Procedure Code, the purchaser at a sale by the sheriff in execution is bound to pay the price within three days. On the lapse of that time, the sheriff, before making his return, addressed a letter to the appellant, requiring him to make payment of the price; and received a reply, through a solicitor, to the effect that the appellant was not prepared to pay, because the sheriff was unable to make delivery to him of the property which he had purchased.

On the 3rd October, 1882, the appellant presented a petition to the Superior Court, craving that the sheriff's *décret* of the 28th August, adjudging the property to him, should be annulled, and the sale declared to be void; or, otherwise, that he should be relieved of his obligation to pay the purchase money. The respondent Company, as judgment creditors, opposed the application; and, on the 4th October, 1882, they presented a petition for *folle enchère* to the Superior Court, demanding the issue of a *bref de venditioni expuas*, under which the property should be resold at the risk of the appellant. In support of his application to annul the sale, the appellant alleged that he had bought the property free of all claims; that the

action taken by the customs' authorities had made it impossible for the sheriff to give delivery to him in terms of the contract of sale; and that he could not obtain possession of the machinery without paying the duties claimed by the Crown, which he was under no obligation to do. On the other hand, the respondent Company alleged that the Crown had, in point of fact, no right to detain the machinery in order to enforce payment of the customs duties. They also denied that the appellant had demanded from the sheriff delivery of the property which he had purchased, and averred that the appellant had never been willing or ready to pay the price, that nothing had occurred which made it impossible for the sheriff to give delivery, and that he had, all along, been ready and willing to do so.

Mr. Justice Torrance, on the 29th December, 1882, disposed of both petitions. He held that the sheriff's sale on the 28th August had purged all privileges and hypothèques upon the property, and that the claim of the Government for customs duties could not interfere with its delivery. Being thus of opinion that no cause had been shown why the appellant Prévost "should not have possession on paying the price of adjudication," the learned Judge dismissed his application, with costs, and gave the respondents decree in terms of the prayer of their petition.

Against that judgment Mons. Prévost appealed to the Court of Queen's Bench for Lower Canada. Before the cause was heard, the Attorney-General intervened in the interest of the Crown, and prayed the Court to declare that the machinery at the time of its seizure by the sheriff was in the possession of the customs authorities, and not of the judgment debtors, and to adjudge and declare that its seizure by the Crown under the *bref d'assistance* was valid, and that the machinery was in the lawful possession of the Crown for the purpose of holding the same until the duties exigible thereon were paid.

After hearing the original parties to these petitions, and also the intervenor, for their several interests, the Court of Queen's Bench gave judgment upon the 23rd January, 1883.

They held that the Crown was a preferable creditor for the amount of the customs duties payable in respect of the machinery, and, although they were of opinion that there was no error in the judgment of Mr. Justice Torrance, they varied his judgment by directing that the resale at the risk of the appellant should be "*sujette au privilège de la Cour—on ne sur les deniers qui représenteront le 'prix des dites machines.'*" They likewise altered the judgment of the Superior Court, in so far as it related to costs, and recommended, or, in other words, ordered that the whole costs incurred by the appellant Prévoist and by the respondent Company in both Courts should be paid by the Crown, and should form a preferable charge upon that part of the price which was payable to the Crown in respect of customs duties.

The reasons for the judgment of the Court of Queen's Bench were delivered by Chief Justice Dorion, and are, in substance, the same as the considerations expressed in the judgment of Mr. Justice Torrance. The learned Judges seem to have been unanimously of opinion that the sheriff's sale had the effect of purging the machinery of all charges, including the rights of the Crown, and that, as soon as the adjudication to the appellant Prévoist was completed, on the 28th August 1882, the Crown could only prefer a claim to be ranked in the distribution of the price. Accordingly, they came to the conclusion which is thus stated by the learned Chief Justice:—"La vente, en ce qui regarde l'appellant, est donc valable, et aussitôt qu'il aura payé son prix d'adjudication il pourra se faire mettre en possession des propriétés adjugées; et en refusant de payer son prix, il s'expose à ce que la propriété soit vendue à sa folle enchère, en vertu de l'Art. 600, C. P. C." The reason assigned for their somewhat remarkable order as to costs was, that the Crown had occasioned the litigation by not intervening at an earlier stage of the proceedings.

Their Lordships are of opinion that neither the judgment of the Queen's Bench, nor that of the Superior Court, which was thereby affirmed, with variations, can be sustained. Both judgments are based upon the ground that, because the seizure by the Crown upon

the 29th of August, and the subsequent detention of the machinery until payment should be made of the customs duties, were, in the opinion of the learned Judges, contrary to law, therefore it was in the power of the appellant Prévoist, upon payment of the *prix d'adjudication*, to put himself in possession of the property sold to him. That is a very startling proposition. The Crown made the seizure of the machinery, and kept possession of it, in virtue of a warrant *ex facie* regular; and in this appeal, as well as before the Court of Queen's Bench, the Attorney General for the Dominion has appeared and pleaded that the Crown acted within its legal right in seizing and detaining the machinery until customs duties to an amount exceeding \$20,000 were paid. The claim of the Crown might or might not be well founded, but nothing in the present case is more clearly apparent than the fact that the claim was deliberately preferred, and has been seriously insisted in, and that the appellant Prévoist if he had in September 1882 paid the price of \$76,000 to the sheriff, could not have obtained possession of the property which he had purchased, except by paying some \$20,000 more which he was not bound to do, or by entering into a doubtful and, it might be, protracted litigation with the Crown. The practical result of the judgments in the Courts below is to relieve the seller of any obligation to give delivery of the subjects sold, and to impose upon the purchaser an obligation to pay the price, and thereafter to attain possession, in the best way he can, it may be, after expensive litigation, and years after he has parted with the purchase money. It appears to their Lordships that such a result is inconsistent with the essential principles of the contract of sale, and is not justified by any peculiarity of the Canadian law.

Art. 1591, C.C., declares that, whilst the rules concerning the formalities and proceedings in judicial sales are to be found in the Civil Procedure code, such sales "are subject to the rules generally applicable to the contract of sale, when these are not inconsistent with special laws or any article of this Code." By Art. 1491, C.C., the principal obligations of the seller, arising out of the contract of sale, are defined to be, "1, the

"delivery, and, 2, the warranty of the thing sold." By Art. 1492 of the same Code, delivery is declared to be "the transfer of a thing sold into the power and possession of the buyer;" whilst the following Article (1493) is to the effect that the obligation of the seller to give delivery is satisfied "when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hindrances thereto are removed."

These articles of the Civil Code merely lay down certain well known rules as to delivery, incidental to the contract of sale, which are common to most, if not to all systems of jurisprudence, and these rules are not in the least inconsistent with any of the formalities and proceedings prescribed by the Code of Civil Procedure in the case of judicial sales. Upon the completion of the contract, there immediately arise mutual rights and obligations on the part of the seller and the purchaser. When the subject of the sale is an *immeuble*, the obligation of the seller is to give the purchaser peaceable possession, and also a clear title, to enable him to defend his possession, and it is the right of the seller, upon fulfilment of that obligation, to demand and receive payment of the price. On the other hand, the obligation of the purchaser is to pay the price upon delivery of possession and of a title sufficient to protect him from eviction. Neither of the parties can exact performance from the other, except upon the condition of fulfilling his own part of the contract.

It was urged on behalf of the respondent Company that the sale to the appellant was perfected by the adjudication of the sheriff upon the 28th August 1882, and that such adjudication had the legal effect of transferring the property to the appellant, and of giving him, at the same time, an unencumbered title. Now, it is not matter of dispute that the sugar factory buildings and the machinery were sold together as an *immeuble*, and, that being the case, the argument of the respondent Company does not appear to be consistent with Article 706 of the Procedure Code, which declares that "no adjudication is perfect until the price is paid, and then it conveys ownership from the time of its

"date." But, assuming that the adjudication did pass the property of the thing sold to the purchaser, that would not, in the opinion of their Lordships, relieve the seller from the performance of the legal obligations incumbent upon him, arising out of the completed contract of sale. The respondent's argument upon this part of the case confounded two matters which are essentially distinct, the perfection of the contract and its due performance. If the appellant had bought a mere title there would have been room for the respondent's contention, but the thing exposed to sale by the sheriff and purchased by the appellant was a sugar factory, and the obligation of the seller, under the completed contract of sale and purchase, was to give him actual possession of the factory.

It was also suggested, in the argument for the respondents, that, in the case of a judicial sale, it lay with the purchaser to take judicial proceedings, if these became necessary, for attaining possession of the property sold to him. The suggestion was based on the terms of Article 712 of the Procedure Code, which provides that a purchaser, who cannot obtain delivery of the property sold from the judgment debtor, must demand it of the sheriff, and upon the sheriff's return or certificate of the refusal to deliver, may apply to the Court for an order commanding the sheriff to dispossess the debtor, and to put the purchaser in possession. The remedy thus provided is a summary method of ejecting the judgment debtor, whose right and interest in the property has already been extinguished by a series of regular judicial proceedings. It has no analogy to the case of a preferable claim, such as is here asserted by the Crown, coupled with actual possession by the claimant, under a formal legal warrant.

A claim of that kind, even assuming that it may ultimately prove to be invalid, can only be determined, and possession recovered, by means of a new litigation which may last for years. It would be contrary to well recognized principles of law and equity to hold, and there is no authority to be found, either in the Civil or Procedure Code, for holding that such a hindrance to the purchaser's obtaining possession must, in the case of an ordinary contract of sale, and in

the absence of special circumstances, be removed by him, at his own expense, and not by the seller.

Their Lordships do not consider it necessary, for the purposes of this case, to decide any of the questions which have been argued before them, in regard to the right of the Crown, either at common law, or under the provisions of the Dominion Act, 40 Vict. c. 10, to seize and retain possession of the machinery in question. It appears to their Lordships to be quite sufficient for the decision of the case between the original parties to it, that no offer has been made to implement the sale of the 28th August 1882, by delivering possession to the purchaser; and that, in point of fact, neither the sheriff nor the respondents have ever been in a position enabling them to give delivery to the appellant, in terms of Articles 1491, 1492, and 1493 of the Civil Code.

Accordingly their Lordships will humbly advise Her Majesty to reverse the judgment of the Superior Court, dated the 29th December 1882, and also the judgment of the Court of Queen's Bench dated the 23rd January 1883, and to grant the prayer of the appellant's petition to have it declared that he is freed from his obligation to pay the purchase money, and to dismiss the petition of the respondents for *folle enchère*, with costs to be paid by the respondents to the appellant of all the proceedings in both Courts, the respondents must also pay to the appellant his costs of this appeal. There will be no order as to the costs of the Crown.

McLeod Fullarton, counsel for Prévost in England.

Lacoste, Globensky, Bisailon & Brosseau, attorneys for Prévost.

Sir Furrar Herschell, Q.C., and *Mr. Jeune*, in England, and

L. R. Church, Q.C., in Canada for Attorney General.

Lumley Smith, Q.C., and *Percy Gye*, counsel in England, and

J. L. Archambault, counsel in Canada for la Compagnie de Fives-Lille.

RECENT U.S. DECISIONS.

Railway—Negligence to Allow Combustible Materials to Accumulate etc.—Negligence may be imputed to a defendant railway company by a jury from evidence that combustible materials have been allowed to accumulate and remain upon its land, liable to be ignited by sparks from its engines, and to communicate fire to property upon adjoining lands. Evidence considered, and *held* sufficient to support the verdict. *Dickinson, J.*, dissenting. In the opinion of the court by *Vanderburgh, J.*, it is said that there was evidence tending to show that the defendant had allowed combustible materials to accumulate upon its right of way. "The evidence," he observed, "also shows that just before the fire broke out volumes of sparks were observed to escape from the smoke-stack of the engine; and on the part of the defendant it was shown that sparks are liable to escape more or less in the ordinary use of engines, though not out of repair or carelessly managed. If, therefore, combustible materials were allowed to remain upon defendant's land, liable, under the circumstances, to take and communicate fire to the adjacent meadows, from sparks escaping in the ordinary running of trains on the road, the jury might be warranted in imputing negligence to the defendant on this ground. *Kellogg v. Railway Co.*, 26 Wis. 223; *Railway v. Jones*, 44 Amer. Rep. 337. That plaintiffs had not taken precaution to prevent fire from communicating from the meadow to their stacks was not negligence *per se* on their part. *Karsen v. Railway Co.*, 29 Minn. 17; S. C., 11 N. W. Rep. 122." *Clarke v. Chicago, etc. R. Co.*, S. C. Minn., May 12, 1885; 23 N. W. Rep. 536.

GENERAL NOTES.

PILGRIM LAWYERS.—*Mr. Vernon* (Washington, Q.C., Mr. Bridges, and other members of the legal and medical professions, with a party of about 70, are making a pilgrimage to the home of Shakespeare. On Sunday the party visited Anne Hathaway's cottage, and there sang a number of Shakespearean glees in the garden. In the evening a concert of Shakespeare's songs, with Locke's music to 'Macbeth,' was given. The mayor of Stratford-on-Avon entertained the party, and under his guidance, visits were made to the poet's birthplace, and tomb in the church.—*Law Journal* (London), Aug. 8.

The Legal News.

VOL. VIII. SEPTEMBER 26, 1885. No. 39.

The smallpox epidemic in Montreal has already given rise to a discussion on a point of criminal law. In the Queen's Bench, Crown Side, a jury had been impanelled in a capital case, and the trial had proceeded for some time, when it was discovered that one of the jurors came from a house in which a bad case of smallpox had just been detected by the medical inspectors. Mr. Justice Baby, after taking time for consideration, decided that it was prudent to discharge the jury, which was done, and the Court room was disinfected. The counsel for the prisoner, who had offered to allow another juror to be substituted for the objectionable one, subsequently opposed the swearing of another jury, on the ground that the prisoner's life had already been in jeopardy. This objection was overruled by the Court. It may be added that this case of *Reg. v. Considine* is rather unfortunate, because after the second jury had sat for a day or two, they also were discharged, owing to the illness of one of their number, who was attacked by so-called "Canadian cholera." The effect of the discharge of jury without verdict was fully discussed in the famous case of *Winsor v. Reg.*, L. R., 1 Q. B. 289, 390.

In *Creed v. Henderson*, 54 Law J. Rep. Chanc. 811, the question came up in Chancery, whether a promise to contribute to a charity can be enforced against the estate of a dead person. In 1881 a Mr. Hudson promised to contribute £20,000 to a fund for paying off debts on Congregational churches. The donation was payable in five annual instalments, and Mr. Hudson died before the last two were paid. The question was whether his estate was liable for the £8,000 remaining unpaid. Mr. Justice Pearson had no difficulty in deciding that, apart from the consent of all parties interested, no executor can lawfully pay a charitable donation promised by his testator, however solemnly, be-

fore his death. The reason, of course, is the absence of consideration for the promise. The donor, if he wishes to secure his charity to the proposed recipients, should by his will direct his executor to pay any balance which may remain due.

The case of *Reg. v. Sheppard* is of some interest, partly because the defendant was brought here from another province to undergo his trial for libel, and partly for other reasons to which it is not necessary to advert. It has shocked some persons that a defendant should be criminally prosecuted for the publication of a libel which he did not see until it was in print. In the result no undue severity is shown. Mr. Sheppard escapes with a fine. In the case of Mr. Edmund Yates, a literary man of some distinction, the defendant under similar circumstances was condemned to four months' imprisonment. Chief Justice Coleridge said (7 Leg. News, 138) "We have considered whether it would suffice to inflict a fine, but a fine on a person conducting a successful paper with a large circulation, is a matter of comparative indifference."

SUPERIOR COURT.

[District of Iberville.]

St. Johns, P.Q., 18 & 19 Aug., 1885.

Before TORRANCE, J.

LOUIS MOLLEUR, *file*, v. CHARLES LOUPRET *et al.*
Prohibition—Information under Banking Act,
34 Vict. Cap. 5, s. 62—*Language of Affidavit—Recusation.*

- Held:—1. *That the information in a case of making a false return under the Banking Act, 34 Vict. Cap. 5, s. 62, may be sworn to by a non-shareholder, and even by a citizen who is a debtor of the Bank.*
2. *The affidavit should be written in the language spoken by the informant, or in one which he understands perfectly.*
3. *Where prejudice is charged against a magistrate, and he denies under oath the existence of any such feeling, the Court will not grant a writ of prohibition on this ground.*

This was the merits of a writ of prohibition addressed to Charles Loupret, district magis-

trate for the district of Iberville, and to Pierre Bourgeois.

The evidence at the trial showed that Pierre Bourgeois made a complaint under oath, before the district magistrate, that Louis Molleur fils, President of the St. John's Bank, had made a false return under oath to the Government of the subscribed and paid-up stock of the bank. The return was required under 34 Vict., cap 5, s. 62 (Canada.) It was stated in Court that the information sworn to by Bourgeois was in the same form and followed the indictment upon which Honoré Cotté was tried and convicted.—*Queen v. Cotté*, 22 L. C. Jurist, 141.

In the present proceeding, the petitioner complained that he had been arrested under the warrant of the magistrate, Charles Loupret, and he prayed that the enquiry before the magistrate might be prevented and the proceedings quashed for divers reasons. 1. Because the informant, Pierre Bourgeois, had no interest to make the complaint and was an insolvent. 2. No offence was shown in the information. 3. The affidavit of Bourgeois was in a language which he did not understand, namely, in English. 4. Because there was enmity and an expression of opinion on the part of the magistrate against Molleur fils, for which the magistrate was recusable as his judge.

The case was tried on Tuesday and Wednesday, and after the argument of counsel the presiding judge gave his judgment.

PER CURIAM. Pierre Bourgeois, as a citizen, though not a shareholder of the bank, and though insolvent, owing the bank a large sum of money, was quite competent to make the charge, which was a public offence. There appears to be no ambiguity in the statement. It is precise and directly charges the falsity of the return made. Then, as to the informality in the affidavit being drawn in a language which was unknown to Bourgeois, this is an irregularity which the Court does not approve of, and here there does not appear any necessity for the use of the English language, but the evidence now given before me satisfies me that Bourgeois perfectly understood the terms of the affidavit and had it explained and read over to him word for word. This is sworn to by

the magistrate as well as by Bourgeois. The magistrate was notified by the affidavit that a misdemeanor had been committed, and issued his warrant to arrest the accused in the usual course. The information under oath was only an accusation, but once made the duty of the magistrate was to proceed with the enquiry. He had no choice. His work was not a judgment. It was only an enquiry. It was not judicial; it was only ministerial, even though the accused were held for the action of the grand jury.

As to the criticisms of the counsel for the petitioner, that on the affidavit now under consideration, the deponent, Pierre Bourgeois, could not be tried for perjury, the question now before this court is not whether there could be a charge of perjury made against Bourgeois, but whether this court is justified in interfering in the proceedings of the magistrate performing an ordinary function under 32-33 Vic., cap. 30. The court would simply call attention to s. 11 of that Act, that no objection of form or substance is to prevail.

The most serious question is the charge against the magistrate that he had enmity, had expressed opinions against the petitioner, and could not do him justice. It was before this court that the magistrate under oath denied the existence of any such feeling. The rules of our civil code of procedure were referred to by counsel, as to recusation of a judge. These are not binding on the court in this case apart from their wisdom, but it is significant that, as a rule for the judges of this court, where there is no written proof of the ground of recusation, the declaration of the judge is conclusive, and the recusing party cannot produce oral testimony nor even obtain delay to produce written evidence: C.C.P. 186. The chief reason, says M. Rodier, *Questions sur L'Ordonnance of 1867, Tit. 24, article 6*, is to show respect to the judiciary. Our code C.C.P. 176, further says that the accusation against the judge for verbal or written threats was limited to the time since the suit began or within the last six months before the recusation. It is surprising how little has been produced in the way of evidence of expressions of feeling towards the petitioner by the magistrate. There is nothing this court can

base a judgment of recusation upon. The petition for the writ of prohibition should therefore be dismissed, but the court seeing no sufficient reason for the information not being in the language of the deponent Bourgeois, orders each party to bear his own costs.

Paradis, for petitioner.

Girard and C. P. Davidson, Q.C., for defendants.

COURT OF QUEEN'S BENCH.

MONTREAL, September 18, 1885.

Before BABY, J.

REG. v. CONSIDINE.

Jury discharged for special reasons—Trial recommenced with new jury.

A jury had been sworn on the previous day to try the prisoner, on an indictment for murder.

In the course of the trial it was made known to the Crown Prosecutor and to the Court that Aug. Guilmette, one of the jurors, came from a house where a bad case of smallpox existed.

The Judge discharged the jury. The case being resumed on the following day, the prisoner's counsel objected that the prisoner having been once put in jeopardy of his life, no new trial could be had.

The Court overruled the objection, and the trial proceeded before a new jury.

C. P. Davidson, Q.C., and *J. A. Ousimet, Q.C.*, for the Crown.

J. J. Curran, Q.C., and *Barry*, for the prisoner.

JURISPRUDENCE FRANÇAISE.

Ratification—Vente—Mineur devenu majeur—Connaissance du vice.

La ratification d'une vente annulable comme consentie par un mineur, résulte suffisamment, de la part de ce mineur devenu majeur, de ce que, actionné par le vendeur en résolution de la dite vente pour défaut de paiement du prix, il s'est borné à opposer à cette action en résolution, bien que connaissant le vice dont le contrat était entaché, une prétendue donation du prix que lui aurait faite le dit vendeur. (22 juillet 1885. *Cass.—Gaz. Pal.* 16-18 août 1885).

Tutelle—Compte—Reddition—Dépens—Faute du Tuteur.

Si, aux termes de l'art. 471 C. Civ., les frais de reddition du compte de tutelle doivent être mis à la charge de l'ayant-compte, cette règle souffre exception lorsque les frais ordinaires d'une reddition de comptes ont été aggravés par la faute, la résistance ou les prétentions injustes du tuteur, notamment, s'il a mis du retard à rendre compte et que ce retard ait nui aux intérêts du mineur.

(7 janv. 1885.—*Cour d'Appel de Lyon.—Gaz. Pal.* 28 août 1885).

THE ADMINISTRATION OF JUSTICE.

[Continued from p. 285.]

A single word expresses the present condition of the law—chaos. Every lawsuit is an adventure more or less into this chaos. An anecdote has been told by a newly appointed judge of his first appearance in the consultation chamber of a court of appeal. The several judges expressed their views, one after another, while one of them walked up and down the chamber, and at length stopping before the new-comer, asked him what he thought of the machine; the questioner heard the answer, and replied, "I thought when I came here that the law was known, but I found that it was only guessed at." What does this anecdote signify? The judges between whom the little conversation occurred were two of the ablest and purest in the State. They had the common law in all its amplitude, with its accumulations of a thousand years. If they had nevertheless to guess at it, is it not high time to try something else?

It is idle to think of going on as we are going. The confusion grows worse all the time. Chaos deepens and thickens daily. If one would see how it works, he has but to look into the case of *Bank of the Republic v. Brooklyn City & Newtown R. Co.*, 102 U. S., where he will get a glimpse of the chaos, and find also an invitation to the judges of New York to change their law, as if they were the Legislature of the State. "The glorious uncertainty of the law" has become too serious for a proverb. What is the remedy? Nothing more or less than a recurrence to first principles, and to have our law made by

the Legislature and not by the judiciary. The function of legislation and interpretation cannot longer be intrusted to the same hands. The law must be reduced to a statutory form. What do we mean by this? Not that every future occurrence can be foreseen and provided for. Not that language can always be made so precise that different interpretations may be impossible. But we mean that the general rules of law upon given subjects may be so stated in a statute as to be guides for the citizen, the lawyer and the judge. We are apt to be imposed upon by names, and some of us seem to be in love with the imposture. Call a Code a statute and half the objections made to it disappear, simply because we are used to statutes and not to Codes. And yet a Code is nothing but a statute; a comprehensive statute it may be, but not an exclusive one. We all believe in statutes, for we have established constitutions in order to get them enacted; we elect legislatures every year to enact them, and we publish every year volumes containing them.

Where must we stop? Shall we be told, thus far you shall go, but no further; you shall not venture into the domain which the judges have appropriated to themselves; you shall not declare the laws of personal property, nor the laws of personal relations, nor the laws of corporations, nor those of contracts and other obligations; the laws of sales, exchanges, partnerships, insurances and negotiable instruments; you shall not tell the holders of public or private securities what rights they have or what duties they assume? But these are the very subjects which the people should be informed of, and for which legislatures are created. The only questions which an intelligent person can ask himself about any proposed body of laws on these subjects are these: Does it state new rules or old ones, or both; if old, are they true; if new, are they right?

The advantage of reducing to a statutory form the rules of law so far as possible is obvious. The citizen should have them for his own instruction and guidance, the lawyer should have them for his study, the judge should have them for his judgment. We all believe that an indictment in a criminal ac-

tion and a complaint in a civil action are indispensable to the protection of the citizen. If the charge, be it criminal or civil, should be formulated, is there not greater reason that the rules of law on which the charge is founded should be formulated also?

We have another motive for action now. Every civilized country in the world has a Code, or is tending toward it. Great Britain alone of all European states is now without it, but even that composite kingdom is moving toward it with steps never halting, though irregular and fitful. It was but the other day that the London Chamber of Commerce presented a memorial to the chancellor of England for a Code of commercial law. The example of Europe has spread into Asia. Japan has a Code already, fashioned after the French model. China is about to pursue the same policy. Shall we, who have a government of the people, by the people, and for the people, alone of all the world, reverse the natural order of things, and leave the body of our laws to be made by a class?

There is another circumstance of lesser importance, but yet not wholly to be overlooked, and that is the admixture in English law of phrases, names and illustrations, monarchical, feudal, insular or Norman, peculiar to the situation and history of England, but unnecessary and unsuitable to be transplanted to these shores. They will readily occur to lawyers. The expressions "within the realm," and "the four seas," the definition of "navigable waters," and the illustration of a base fee are some of the examples. "Cestui que trust," "baron and feme," "feme covert," "pur autre vie," "seemble," would not now be endurable, except by those whose life work it has been to "scrawl strange words with a barbarous pen."

Blackstone illustrates a base fee as one that would be created by a "grant to A. and his heirs, tenants of the manor of Dale." Kent has it, "to a man and his heirs, tenants of the manor of Dale." And very likely the expression has gone on in regular descent from commentator to commentator to the present year of grace. These are more than mere matters of taste; they mark the servility with which we copy from over the sea. Is it not time to set up for ourselves?

A restatement of the objections to the making of law by the judges may be given as follows :

1. It is not their function. In fact it violates the first principles of free government, which is the separation of its functions into three departments : legislative, executive and judicial.

2. The judges are unfitted to the making of law as they make it; not from unfitness in the judges themselves, but because they do not meet, consult and agree together about the law to be made.

3. The law made by the judges is not only fragmentary or retroactive, made for the act after the act is done, and at the expense of the suitor, who, if he had known beforehand what the law was to be, might have conformed to it.

4. The law made by the judges is made in part by persons not belonging to the community over which it is to be enforced; that is to say, the law which furnishes the rule for one State is made partly by the judges of other States and of foreign lands.

5. The law made by the judges is full of discordant elements; so discordant indeed that the process of selection is a game of hazard, if it does not become a game of chance.

6. The multiplication of law books coming from the judge-law-makers has already increased beyond all endurance, and is increasing in a compound ratio.

7. The law made by the judges is continually changing, and it is difficult to know beforehand what they will decide upon any given question.

Indeed if it were possible to put into ten words the chief cause of the present delay and uncertainty in our judicial administration, they would be these: Complex procedure, inadequate judiciary, procrastination, re-trials, unreasonable appeals, uncertain law.

Having thus presented an outline of the proceedings in lawsuits, the delay and uncertainty therein and their causes, we are brought face to face with the question of remedy. This is the work partly of the Legislature, partly of the courts and partly of the bar. The due share of each, we hope, may be made to appear as we go along. We have endeavored to give a brief summary of the usual proceedings in a hotly-contested litigation. They may be different in details in different States, but their essential features are the same in all. The delays in the various processes have been explained. We see where they occur and why they occur, and the only question remaining concerns the remedy.

Instantaneous justice is an impossibility. Even if the plaintiff alone were to be heard,

the proper consideration of his claim would require some deliberation. Hence a little delay at least. And if the defendant comes into court he must be heard also. Hence more delay. And then the sittings of the courts are, to some extent at least, periodical. The nearest approach to a continuous sitting of the highest courts of first instance occurs probably in the city of New York, where trial courts are in session from the first Monday to the last Saturday of every month, except July, August and September. Bearing in mind then the necessity of giving to each side the opportunity of being fully heard, bearing in mind also the periodical sitting of the courts, and bearing in mind further the causes of uncertainty as we have explained them, we are to inquire what can be done to lessen the delay in the successive steps of the controversy and the uncertainty of the final result.

REMEDIES.

We have almost imperceptibly fallen into some observations respecting remedies, as we were discussing the causes of delay and uncertainty. We are now to proceed with the latter, at the risk of some repetition. A simple and direct method of procedure should be everywhere provided, without a single unnecessary distinction or detail, and without division into legal and equitable actions, or into different forms of legal actions. There is enough in the law to be learned without the study of needless distinctions and processes. The statement of claim and defence, that is, the pleadings, while they should be written, in order that the contestants may know precisely what is alleged on either side, and that a record may be kept for future use, should be as short as possible, and easy of amendment, in order that justice may never miscarry, from honest mistake. They should be delivered between the parties or filed with the clerk at any time, in vacation or in term. There can be no need of waiting for the sitting of a judge.

The issue being joined and the parties thus apprised of the precise points of contention, the trial should follow speedily. A few days may be necessary for this preparation. Witnesses are to be summoned; they may not all be at hand; and a commission to examine them may be necessary. How much of delay this may occasion cannot be foretold, and must be left out of the calculation. But when the parties are ready for the trial there should be, as already insisted, a tribunal ready to hear them. In some of the States the courts sit only twice a year, so that a delay of six months may occur before a trial can be had; and in some States a continuance over the first term is matter of right. Thus it seems that there are communities in which it is thought necessary to give a party charged

with an infraction of law a year's breathing time before answering. If the rule of *Magna Charta*, four courts a year in each county, and every case in readiness tried, was a good one six hundred years ago, nothing less should satisfy us now. In some of the States their Constitutions may not allow the establishment of courts enough to clear off all the cases as they arise. The Constitutions then are at fault, and the people who are the ultimate sources of justice, as of all other attributes of government, can by amendment make their Constitutions elastic enough to allow courts and judges to be increased or diminished according to the urgency of demands for justice. And we venture to affirm that the State fails in its duty to its people when it allows its courts of justice to adjourn leaving untried any case ready for trial.

If any thing could make one doubt the capacity of a people for self-government, it would be the spectacle of its Legislature, profuse in its general expenditures and niggardly in its appropriations for the administration of justice. Nothing can excuse the neglect to provide a judicial force sufficient for all the legal business of the country or the State, sufficient in quality and quantity, for one is of no use without the other; and yet we see cases everywhere waiting for trial, without courts to try them, and we see in many quarters judges so poorly paid that judicial places offer no temptation to those who are fit to fill them. We have even seen Congress twice within three years failing to make appropriations for the pay of jurors, so that for awhile in some of the Circuits of the United States no jury trial could be had.

The trial being opened, should be carried to its end just as fast as can be done with safety. But its duration depends more upon the judge and counsel than upon legislation. The law indeed can do but little to counteract mismanagement or supply the want of discipline in the court. It can indeed impel the judge whenever he is halting in his duties. The judge, if he will, can be prompt, strict and firm; he can so control the cause as to leave no chance for dawdling or impertinence; he can exact implicit obedience to legal rules; can require quick questioning and short speeches; reject repeated or insolent questions, whether objected to by counsel or not, and can continue the sitting longer or shorter as he finds expedient. The respective counsel can assist the judge in all this, and at the same time protect every right of their clients. Among other things, the judge can prevent a trial from degenerating into a contest of abuse toward clients and counsel or an onslaught upon witnesses.

It is painful to see reported, as we do so often, the insulting language thrown at parties, counsel and witnesses, without a word of rebuke from the judge, who sits with as

much apparent unconcern as if it were a thing of course. There are too many of these instances to be lightly passed over. It might do in Coke's time to address a party as he addressed Raleigh, with "Thou viper, I thou thee, thou traitor," but it will not do in these our days. It is high time that an end were put to the unseemly exhibitions in some of our modern courts.

Most of us can call to mind two judicial districts, side by side, in one of which the judge is alert and firm; he keeps his business well in hand, and clears his calendar every time; the other is a good lawyer and a good man, but he is feeble and indulgent; the lawyers run away with him; and the suitors run from him; he is always in arrears, and the arrears grow year by year. Yet these two judges are holding office under the same authority and administering the same laws. Is it impossible to make the last judge follow the example of the first?

We have said that much cannot be done by legislation to shorten trials. But where so much depends upon the judge, we suggest the advantage of concerted action, and recommend that the judges of each State, meet from time to time for consultation upon the best methods of maintaining the discipline and efficiency of the judicial establishment. Legislation however can provide that the verdict of the jury be special in every case, if required by either party or the court. This, as has been said already, will often save the necessity of a new trial, even though some of the exceptions may be found to have been well taken. The practice prevails in England under the Judicature Act and has lately been adopted in Nova Scotia, where it is said to have proved successful.

There is a provision in the law of New York that "An error in the admission or exclusion of evidence, or in any other ruling or direction of the judge upon the trial, may in the discretion of the court which reviews it be disregarded, if that court is of opinion that substantial justice does not require that a new trial should be granted." This is comprehensive enough, one would think, to prevent new trials, except for grave reasons; nevertheless the instances are few in which an error at the trial has been shown without drawing after it a new trial of all the issues. This is greatly to be regretted. Indeed we do not see how the assumption that an error at one trial must entail after it a new trial unless it appears that it could not possibly have affected the verdict, can result in anything but delay heaped upon delay. Where there is no constitutional provision to prevent it, the judges might well be intrusted with power to dispose of the case upon the evidence or special findings without sending it back to a jury, unless the issues are of a kind which specially require the interven-

tion of that body. The laws of evidence are neither many nor difficult. The questions which most frequently arise under them and are made the occasion for new trials are less commonly questions of law than of logic, in respect of which an educated person off the bench may be as good a judge as on it. For example, suppose that in a suit against a surgeon for an unskilful operation, the question were asked whether he had sent in a bill for the service, should not the question be admitted? Why not? The neglect of one who lives by his profession to claim compensation for his services is a circumstance which most men would regard as of some weight in judging of his own consciousness of having failed of his duty. And at all events a just inference from the neglect is as likely to be drawn by the jury as by the judge. But surely the admission of the question should not be a reason for ordering a new trial.

The verdict being rendered, and judgment pronounced, the preparation of appeal papers, if an appeal be taken, is, or should be, merely clerical. Nothing new should be put into the record; nothing important should be taken out of it. Whatever of delay there be after judgment once pronounced, is in the hearing and deciding of an appeal. Here, where there ought to be little or none, it is great and scandalous. Where does it occur? In the hearing more generally than in the decision, though often in both. In the Supreme Court of the United States the decision, except in very exceptional cases, follows rapidly on the heels of the argument. So it does in the Court of Appeals of New York, and so we suppose it does in the highest courts of the other States. What then is to be done to provide a speedy hearing? Fewer appeals and judges enough to hear them, that is all. When we say judges enough to hear them, we mean judges enough to hear them as soon as they arise.

The obligation of the State to all its people is plain; it is to provide a competent and honest judge to hear and decide every question of an infraction of the laws; this obligation is absolute; but when it is once fulfilled the obligation to give also an appeal is qualified by circumstances. First, the State ought not to provide for allowing an appeal if it cannot provide for the hearing of it. It might as well offer an empty cup to a man dying of thirst. So much is clear. Nor ought it to allow an appeal if the presumption is great that justice has already been done, as in the case of two concurrent courts, unless a certificate be given by a judge that the case ought further to be examined. When indeed a question of public importance has arisen in respect of which a uniform rule throughout the State or Nation is imperative, an opportunity for the establishment of such a rule must be given, and when it can only be

given through the highest judiciary, as in case of a constitutional question, then an appeal to the highest judiciary should be allowed. These are the two conditions which qualify the right of appeal, and applying these rules will enable us to solve all or nearly all the problems which confront us as to the number of judges and the number of appeals.

The judges of all courts except those of last resort should be compelled to render their decisions within a fixed period. How they can hold back their opinion as they do is a marvel which we should not believe were we not used to it. It is hard to conceive how any one having a proper sense of responsibility can leave upon his table untouched, day after day, papers which might relieve painful anxiety, perchance save from discredit or bankruptcy. One thing is certain, that either the judges account it unimportant what they decide, or they think nothing of withholding that which they were specially appointed to give, and that which suitors have a right to demand. Many cases in the lower courts, most of them, indeed, could be decided immediately upon the argument. The subject is then fresh in the minds of the judges, and the conclusions they reach at the close of the argument, if they were obliged to announce them then, would in nine instances out of ten be as just and as satisfactory as if they were given a week or a month or a year afterward. We fear that the inclination to write an opinion may unconsciously influence the mind to keep the case under advisement. Maryland and California have put into their Constitutions a command upon the judges to decide within fixed and short periods. The example of these States in this respect is worthy to be followed.

We think that the following should be deemed fundamental maxims of government in respect of the judicial establishment:

1. The Constitution should provide for one permanent court of last resort in the State, to which appeals should be so limited as not to exceed the capacity of the court to hear and decide them as they arrive. And if it should ever become so overburdened as to be obliged to adjourn for a term without hearing all the cases in readiness, further appeals should thereupon be limited until the court can clear off the arrears together with the current business. Temporary commissions should not be resorted to in courts of last resort.

2. The Constitution should also provide not only for permanent inferior courts, equal to the business of ordinary times, but for temporary commissions, as occasion may arise, to clear off arrears in the courts of first instance.

3. The methods of procedure should be as

direct and simple as possible, without an unnecessary distinction or an unnecessary proceeding.

4. The number and distribution of the judges, the frequency of the courts and the simplicity of the procedure should be such, that when the witnesses are in the State, the most strongly-defended lawsuit may be terminated in the court of first instance within a few months, and even should the case go to the utmost limit of appeal within the State, it may be terminated within a year at most from its beginning in the court of first instance to its ending in the court of last resort.

The conclusions at which we have arrived are that the present delay and uncertainty in judicial administration can be lessened, and by means as follows:

1. Summary judgment should be allowed upon a negotiable instrument or other obligation to pay a definite sum of money at a definite time, unless an order of a judge be obtained, upon positive affidavit and reasonable notice to the opposite party, allowing the defendant on terms to interpose a defence.

2. In an ordinary lawsuit the methods of procedure should be simple and direct, without a single unnecessary distinction or detail; and whatever can be done out of court, such as the statement of claim and defence, should be in writing, and delivered between the parties or their attorneys, without waiting for the sitting of a judge.

3. Trials before courts, whether with or without juries, should be shortened by stricter discipline, closer adherence to the precise issue, less irrelevant and redundant testimony, fewer debates, and without personal altercation.

4. Trials before referees should be limited in duration by order made at the time of the appointment.

5. The postponement of a trial should not be allowed because of the engagement of counsel elsewhere, nor ever, except in strict conformity to rules previously made by the judges, and for reasons of fact known to the court or proved by positive affidavit.

6. The record of a trial should contain shorthand notes of all oral testimony, written out in longhand and filed with the clerk; but only such parts should be copied and sent to an appellate court as are relevant to the point to be discussed on the appeal, and if more be sent the party sending it should be made to pay into court a sum fixed by the appellate court by way of penalty.

7. A motion for or against a provisional remedy should be decided within a fixed number of days, and if not so decided the remedy should fail. A week is time enough for a judge to hold such a motion under advisement. If he cannot within it make up his mind that a provisional remedy should

be maintained it ought to fail. In all other cases a decision within a fixed period should be required of every judge and every court, except a court of last resort.

8. The ordering of new trials should be restricted to cases where it is apparent that injustice has been done.

9. Whenever a court of first instance adjourns for a term, leaving unfinished business, the executive should be not only authorized, but required, to commission one or more persons, so many as may be necessary, to act as judges for the time being, and finish the business. Such temporary judges should be commissioned in all courts except the court of last resort.

10. Whenever a court of last resort adjourns for a term, leaving unfinished business, further appeals to it should be so limited as to bring the cases before it speedily down to the limit of its ability.

11. The time allowed for appealing should be much shortened. One month, or at most two, should seem to be enough in all cases.

12. Greater attention must be paid to the selection of judges; without which no other reform, however good in itself, can succeed.

13. The law itself should be reduced so far as possible to the form of a statute.

14. Statistics of the litigation in the courts of the United States and of each State should be collected and published yearly, that the people may know what business has been done and what is waiting to be done.

In conclusion, we are obliged to admit that most of the blame for the delay and uncertainty which we have been discussing rests upon the profession of which we are members, in both its branches, whether on the bench or at the bar. We are a host in numbers; we have influence, direct and indirect, greater than that of any other profession or class of men in the country; we are part and parcel of the judicial establishment; we know best the laws of the land as they are, and we should know best what they ought to be; we can make ourselves heard and heeded in every legislative hall, in every executive chamber, and on every bench of justice; and we have given pledges, not less binding because not expressed in words, that the functions with which the State has endowed us shall be used to promote justice, not alone by assisting suitors in their private controversies as they arise, but by doing our best to make the occasions of such controversies as few as possible, and the issue thereof as speedy and as near the right as we can make them. That we have failed so long to redeem these pledges is no reason for failing longer. Let us redeem them now.

All of which is respectfully submitted.

August 19, 1885.

DAVID DUDLEY FIELD.
JOHN F. DILLON.

The Legal News.

VOL. VIII. OCTOBER 3, 1885. No. 40.

The decision of the Court of Review, on Wednesday, in the case of *Elliot v. Lord*, is of considerable importance to the profession, as it shows the extent of the plaintiff's privilege for costs of suit under Article 606 of the Code of Procedure, as amended by 33 Vict., c. 17, s. 2. The plaintiff in this case had been obliged to go to the Privy Council to obtain his judgment, the decision of the Superior Court in his favor having been reversed by the Queen's Bench. The costs are of course very considerable, and the effect is that in executing the judgment the attorneys for the plaintiff rank by privilege for the costs in three courts, and sweep away the landlord's *gage*. This is a case as hard as that supposed by Chief Justice Meredith in *Bruneau v. Gagnon*, 4 Q.L.R. 319. The learned Chief Justice in that case remarked: "If the owner of real estate worth £100, and mortgaged for that sum, were sued in an action of damages, in which the plaintiff's costs amounted even to \$200, and the defendant's property were sold to pay those costs, the hypothecary creditor could hardly hope to receive anything; and thus the debtor, who had no interest in the property, after he had hypothecated it to its full value, would have disposed of it to the prejudice, and without the consent of the person really interested in it, namely the mortgage creditor." But the decision in *Elliot v. Lord* makes it possible for a claim of perhaps \$2,000 instead of \$200 to come in before the hypothecary creditor. The security afforded to mortgagees by the Registration law is so seriously disturbed by the amended article of the Code that the Legislature will probably require to consider whether some restriction should not be put upon the privilege.

Dr. Savage, Superintendent of the Bethlehem Hospital, London, in an article in the *Medico-Legal Journal*, defends the position, that unless insanity existed at the time of a marriage, it ought not to be allowed as a

ground for divorce. He says: "I pity the unfortunate man or woman who is tied for life to an insane partner, yet the good of the whole body politic has to be weighed against individual suffering. As to this point, I must say that I see no chance of freeing, with safety to society, the partner with an insane companion from his contract. For, in the first place, this could not be done unless the patient were adjudged incurable. And few men of experience would dare to give an opinion of absolute incurability, except in cases in which death would soon give the divorce. The older I grow, and the more cases I see, the less dogmatic do I become in giving absolute opinions of incurability of insanity, as seen coming on in young or middle life. I have seen cases discharged recovered and remain well, after being insane and in asylums for over twenty years. I have seen an intellectual second summer arise when perpetual winter was certainly to have been expected. With such experience, I should myself—if called to give an opinion as to the absolute incurability of a case—only feel justified in giving it when general paralysis, senile dementia, and idiocy were present, for even epilepsy may pass off in time."

Ex-Judge Thompson, the new Minister of Justice of Canada, was first returned to the local legislature of Nova Scotia for Antigonish in 1877, and in 1878 entered the Cabinet, of which Hon. Mr. Holmes was Premier, as Attorney-General. This position he retained until shortly before the general election of 1882, when, on the reconstruction of the Cabinet, he became Premier, and as such appealed to the country, being himself re-elected, although his party was defeated on its railway policy. Mr. Thompson was shortly afterwards appointed a justice of the Supreme Court of Nova Scotia, a position which he has now resigned in order to take the office of Minister of Justice.

Mr. Thompson's successor on the bench is J. Norman Ritchie, Q.C. It has been remarked that the new judge is the fourth member of his family appointed to a seat on the bench. His father, Thomas Ritchie, the son of a United Empire Loyalist, after sitting

in the Legislature of Nova Scotia for many years, was made judge of the Supreme Court. This gentleman married a sister of the late Hon. J. W. Johnston, for a quarter of a century Conservative leader in Nova Scotia, by whom he had a large family. The eldest son, Sir William Johnston Ritchie, is Chief Justice of the Supreme Court of Canada. A second brother, J. W. Ritchie, succeeded ex-Governor Archibald as Judge of Equity in Nova Scotia, and occupied the position until three years ago, when he resigned and was succeeded on the bench by the present Minister of Justice. The newly appointed judge has been at the bar for over a quarter of a century and for some years has been Recorder of the City of Halifax.

SUPERIOR COURT.

QUEBEC, Sept 21, 1885.

Before CABAULT, J.

ROBICHAUD V. LA COMPAGNIE DU PACIFIQUE CANADIEN.

Carrier—Connecting line—Delay after transshipment—Condition.

Held:—*That the condition on the back of a railway company's shipping bill, exonerating the company from liability for delays after goods are delivered to a connecting line at the extremity of the receiving company's line of railway, is a reasonable condition, and will exonerate the receiving line of railway from responsibility if delay occurs after transshipment to the connecting line has taken place.*

The plaintiff shipped a box at Smith's Falls, on the line of the defendant's railway for the City of Quebec, prepaid freight, and stipulated that the box should go by way of Brockville and thence over the Grand Trunk Railway to Quebec, instead of going by Ottawa and Montreal, via the North Shore Railway line. The Company defendants took from plaintiff an ordinary shipping bill signed in duplicate with the usual conditions printed on the back, thereby undertaking to make delivery of the box at Quebec as shipped.

One of the conditions on the bill read as follows:—

"And it is expressly agreed and declared

"that the Canadian Pacific Railway Company shall not be responsible for any loss, misdelivery, damage or detention that may happen to goods sent by them if such loss, misdelivery, damage, or detention occur after the said goods arrive at stations or places on their line, nearest to the points or places where they are consigned to, or beyond their said limits."

The proof showed that the box was delivered to the Grand Trunk Railway Company at Brockville as agreed, upon the day after it was shipped from Smith's Falls, and that the Grand Trunk Railway Company gave a receipt for the box, undertaking to deliver it at its destination.

The plaintiff sued for the recovery of \$100 damages on account of delay experienced of over six months before delivery was made.

The following was the judgment of the Court:—

"Attendu que la boîte mentionnée dans la déclaration du demandeur, devait, à sa demande, être transportée par la défenderesse de Smith's Falls à Brockville et par la compagnie du chemin de fer du Grand Tronc du Canada, de Brockville à Québec, et que, quoique la dite défenderesse ait reçu le fret pour le transport de la dite boîte jusqu'à Québec, elle avait, par la lettre de voiture donnée au demandeur, stipulé expressément entre autres conditions spéciales, qu'elle l'expédiait à celle qu'elle ne répondait pas de la perte ni de la détention d'icelle, ni des dommages qu'elle pourrait subir au-delà de ses limites;

"Attendu que la dite défenderesse a, le 29 septembre 1883, le lendemain de sa réception, remis la dite boîte à la compagnie susdite du Grand Tronc, à Brockville, et que la détention de la dite boîte dont se plaint le demandeur n'a eu lieu qu'après sa remise à cette dite dernière compagnie; et que la condition susdite dans la dite lettre de voiture était raisonnable; et que, étant une des conditions du contrat entre la défenderesse et le demandeur, elle liait ce dernier; et que la défenderesse n'est pas sous ces circonstances, responsable pour les délais apportés à la livraison de la dite boîte après qu'elle l'eût remise à la dite compagnie du Grand Tronc de chemin de fer du Canada, l'action du dit demandeur est renvoyée avec dépens distraits tel que demandé."

Action dismissed.

TRIBUNAL CIVIL DE LA SEINE,
FRANCE.

Paris, juin 1885.

MONTHEL V. DUHAMEL et al.

Mandataire—Accident—Responsabilité.

Jugé : *Que le propriétaire d'un cheval qui prend le mors au dent et ne peut plus être contrôlé, est responsable des dommages que cause cet animal, lors même que le propriétaire l'aurait confié à un de ses serviteurs pour un service spécial, et que, dans l'exécution de ce service, celui-ci l'aurait remis à un tiers, en la possession duquel était le cheval lorsque l'accident a eu lieu.*

Le 7 novembre 1880, M. B...., lieutenant au... régiment d'artillerie, était allé à cheval à Bois-Colombes pour rendre une visite à ses parents. Il était suivi de son ordonnance L... qui montait un autre cheval. Arrivé à destination, le lieutenant B... confia son cheval à L... en lui recommandant de le ramener à Paris à l'école militaire.

A l'entrée d'Asnière L... rencontra un nommé Duhamel à qui il demanda son chemin, et l'ayant fait monter sur le cheval du lieutenant ils s'engagèrent tous deux dans les rues d'Asnières. Arrivant sur la place du marché, Duhamel ne put modérer l'allure de son cheval, qui renversa la dame Montel, mère de trois jeunes enfants et la piétina. Cette dernière mourut quelques heures après des suites de ses blessures.

Par jugement du tribunal correctionnel de la Seine, Duhamel avait été condamné à un mois d'emprisonnement et L... à 50 fr. d'amende, celui-ci avait été puni par l'autorité militaire.

A la suite de cette condamnation, le sieur Montel au nom de ses trois enfants mineurs avait assigné Duhamel et le lieutenant B... comme responsables de l'accident, en dommages-intérêts.

Le tribunal civil de la Seine a rendu un jugement qui a condamné le lieutenant B... et Duhamel solidairement, à payer à Montel et ses enfants, la somme de 4,500 fr. et a ordonné que cette somme sera employée par les soins des défendeurs à l'achat de trois titres de rente 3 p.c. sur l'Etat français, d'une valeur égale à 1,500 fr. de capital chacun, qui seront immatriculés chacun au nom de l'un des

mineurs Montel. L... et Duhamel ont été en outre, condamnés aux dépens.

Le tribunal a motivé son jugement sur l'article 1384 du Code Civil. L... et Duhamel doivent être considérés comme les préposés du lieutenant B... ; et l'article 305 de l'ordonnance du 2 novembre de 1883, sur le service intérieur des troupes à cheval ne s'applique pas, la responsabilité dans l'espèce doit être jugée d'après le droit civil et les règles du mandat.

(Rapport de Maître Albert, Journal de Paris.)
(J. J. B.)

APPEAL REGISTER—MONTREAL.

Sept. 15, 1885.

Fairbanks & Barlow & O'Halloran.—Heard on motion by each respondent (Blodgett, O'Halloran and South Eastern Ry. Co.) for dismissal of the appeal; also on motion of appellant for leave to produce reasons of appeal. C. A. V.

Mowry & The Quebec Central Railway Co.—Heard on motion for leave to appeal from interlocutory judgment. C. A. V.

Coursol & Les Syndics de la paroisse de Ste. Cunegonde.—Heard on application for privilege. C. A. V.

Stephens & Gillespie.—Heard on merits. C. A. V.

Bury & Silberstein.—Heard on merits. C. A. V.

Sept. 16.

Coursol & Les Syndics de la paroisse de Ste. Cunegonde.—Application for hearing by privilege granted.

Fairbanks & Barlow & O'Halloran.—The three motions of respondents for dismissal of appeal granted as to costs. Appellant's motion to be relieved from foreclosure granted without costs.

Mowry & Quebec Central Railway Co.—Motion for leave to appeal rejected with costs.

Longtin & Charlebois.—Motion for dismissal of appeal. The appellant making default, the appeal was dismissed.

Mullin & McCreedy.—Heard on merits. C. A. V.

Malboef & Laurendeau.—Heard on merits. C. A. V.

Baylis & Stanton.—The parties file a declaration that the present case has been settled

out of court. In consequence it is ordered that the cause be put out of court, and that the record be remitted.

Sept. 17.

Vineberg & Moss.—Heard on motion to dismiss appeal. C. A. V.

Senecal & Hatton & Hibbard.—Heard on motion of Hibbard that execution be allowed. C. A. V.

Black et al. & Dorval.—Heard on merits. C. A. V.

Marchildon & Charland.—Heard on merits. C. A. V.

Neil & Craig.—The appellant was heard on merits, the respondent not appearing. C. A. V.

Macdougall & Demers.—Part heard on merits.

Sept. 18.

Ex parte Elise Lepage, petitioner for *habeas corpus ad subjiendum*. Heard on petition to be authorized to *ester en justice*, and to be permitted to proceed in *forma pauperis*. C. A. V.

Dorion & Crowley.—Motion to dismiss appeal. Granted for costs.

Grothé & Suunders.—Acte is given of the production of the suggestion of appellant's death.

Macdougall & Demers.—Hearing on merits concluded. C. A. V.

Corrner & Byrd.—Heard on merits. C. A. V.

St. Lawrence Steam Navigation Co. & Lemay. Heard on merits. C. A. V.

Sept. 19.

Elise Lepage, petitioner for *Habeas Corpus*.—Petitions to be authorized to *ester en justice*, and to be permitted to proceed in *forma pauperis*, granted.

Filiatrault & Belair.—Heard on petition for leave to appeal. C. A. V.

De Bellefeuille & Prudhomme.—Petition for leave to appeal rejected.

Bell & Court & McIntosh.—Inscription struck.

Hamilton Powder Co. & Lambe (Two cases).—Heard on merits. C. A. V.

Sept. 21.

Dickson & Galt.—Heard on motion to quash writ of appeal. C. A. V.

Northwood & Borrowman & Borrowman.—Heard on petition to take up *instance* for respondent, and on appellant's motion for security for costs. C. A. V.

Thayer & Foley.—Heard on the merits. C. A. V.

Dorion & Crowley.—Heard on merits. C. A. V.

Grant & Federal Bank of Canada.—Heard on merits. C. A. V.

Charland & Hus.—The appellant not appearing, appeal dismissed.

Sept. 22.

Hubert & City of Montreal & Delle. H. Hubert.—Heard on demand for *acte of desistement* by Delle. H. Hubert, and on petition of Barnard & Barnard for suspension of proceedings until payment of their costs. C. A. V.

Muldoon & Dunn.—Heard on petition for appeal. C. A. V.

Jones & Powell.—Heard on the merits. C. A. V.

Bessette et al. & Gerbié.—Part heard on merits.

Sept. 23.

Ex parte Massé.—Petition to be appointed a bailiff of this Court granted.

Reinhardt & Davidson.—Motion for dismissal of appeal granted for costs.

Exchange Bank & Cheney.—Motion for dismissal of appeal granted for costs.

Bessette et al. & Gerbié.—Hearing on merits concluded. C. A. V.

Coursol & Syndics, Ste. Cussegonde.—Judgment confirmed.

City of Montreal & Walker.—Heard on merits. C. A. V.

Lemay & Laganrière.—Heard on merits. C. A. V.

May & McIntosh.—Submitted on factums. C. A. V.

Sept. 24.

Vineberg & Moss.—Motion to dismiss appeal rejected.

Senecal & Hatton & Hibbard.—Motion of Hibbard that record be sent down and execution allowed, granted.

Filiatrault & Belair.—Petition for leave to appeal, rejected.

Dickson et al. & Galt.—Motion for dismissal of appeal granted as to Dickson, and rejected as to Wanless.

Northwood & Borrowman & Borrowman.—Respondent's petition to take up *instance* granted. Appellant's motion for security for costs rejected. Cross, J., diss.

Lamoureux & Parker.—Appeal dismissed, the appellant not appearing.

Wheeler & Dupaul.—Motion for new security granted; delay to give new security to 1st day of next term.

Rouillard & Lapierre.—Heard on merits. C. A. V.

Humphrey & Ross.—Heard on merits. C. A. V.

Wheeler & Black.—Heard on merits. C. A. V.

Hebert & Cuthwell.—Heard on merits. C. A. V.

Lamarche & Enault.—Heard on merits. C. A. V.

Sept. 25.

Hubert & City of Montreal & Hubert.—Acte of the *desistement* is given in so far as Miss Hubert is concerned, reserving to Messrs. Barnard & Barnard, all recourse they may have under the judgment of this Court. Petition of Barnard & Barnard rejected without costs.

Cross & Windsor Hotel Co.—Judgment reversed.

Duchemeau & Lizotte.—Judgment reversed, each party paying his own costs in all three courts.

McShane & Millburn.—Judgment reversed. Motion for appeal to Privy Council granted.

McShane & Hall.—Judgment reversed. Motion for appeal to Privy Council granted.

Johnson & Consolidated Bank.—Judgment confirmed.

Fisher & Evans.—Judgment reversed.

Exchange Bank & Pichette.—Judgment confirmed.

Le Séminaire de St. Hyacinthe & La Banque de St. Hyacinthe.—Judgment reversed, Tessier, J., diss.

Jones & Cuthbert.—Judgment confirmed.

Blumenthal & Forcimer, & Tait et al. & Jones et al.—Motion for leave to appeal from interlocutory judgment rejected.

Bell & Court & McIntosh.—Writ returned.

Reg. v. Laporte.—Case settled by surrender of child, without costs.

Burroughs & Wells.—Four days' delay to file factum.

Butler & Ross.—Motion for leave to appeal from interlocutory judgment, rejected.

Robinson & Canadian Pacific Railway Co.—Motion for leave to appeal from interlocutory

judgment granting a new trial. Motion granted.

Sept. 26.

Muldoon & Dunn.—Motion for leave to appeal granted.

Brunet & Corporation du Village de St. Louis.—Judgment confirmed.

Whitehead & White.—Judgment confirmed.

Corbett & Corporation of Huntingdon.—Judgment confirmed, Tessier, J., diss.

D'Orsennens & Christin.—Judgment reversed. *McGibbon & Bedard*.—Record produced, and rule discharged.

Grothé & Saunders & Grothé.—Petition for *reprise d'instance* granted by consent.

Heathers & Forest.—Judgment confirmed.

Rouillard & Lapierre.—Judgment confirmed.

Humphrey & Ross.—Judgment ordering record to be sent back to prothonotary, each party paying his own costs. Ramsay, J., diss.

Bell & Court & McIntosh.—Papers filed by the prothonotary.

The Court adjourned to Nov. 15.

RECENT U. S. DECISIONS.

Evidence—Marriage.—A marriage may be proved, even in a criminal prosecution, by the testimony of one who was present at the celebration. Maxwell, J., said: "At common law, in trials for polygamy, adultery, and criminal conversation, proof of marriage must be made by direct evidence or its equivalent. 2 Greenl. Ev. § 461; 1 Phil. Ev. (4th Amer. Ed.) 631, 632. But, even at common law, proof of a marriage having been celebrated by a person who was present, was sufficient. 1 Phil. Ev. 632. *Hemmings v. Smith*, 4 Doug. 33. Any person who was present when the marriage took place is a competent witness to prove the marriage; and it is enough that he is able to state that the marriage was celebrated according to the usual form, and he need not be able to state the words used. *Fleming v. People*, 27 N. Y. 329. In this state no proof of the official character of the person performing the ceremony is necessary, and his certificate or a copy of the record, duly certified, will be received in all courts and places as presumptive evidence of marriage. In the absence of evidence to the contrary, the statute of Pennsylvania will be presumed to be like our own. *Moses v. Com-*

stock, 4 Neb. 519. *Story*, *Conf. Laws*, § 637. The marriage was abundantly proved, and was followed by the parties living together as husband and wife for more than twelve years. They evidently regarded it as a valid marriage, and such we have no doubt, from the evidence before us, it was." *Lord v. State*, S. C. Neb., May 12, 1865; 23 N. W. Repr. 507.

THE "AMOVAL" OF MR. JUSTICE WILLIS.

The doubt cast upon the legality of the tribunal by which Riel was tried, implied by the appeal to the Judicial Committee of the Privy Council, calls to mind a previous instance in which the authority of a Canadian court of justice was disputed under remarkable circumstances. As early as 1827 the project, which was not carried out for several years afterwards, of establishing a court of enquiry in Upper Canada, had been taken into consideration by the Colonial office. An English barrister of some reputation and whose marriage to a daughter of the Earl of Strathmore had given him a share of social influence beyond what was due, perhaps, to his professional position, was proposed as a fit person to undertake the duties of the new office. Meanwhile, the post of puisne judge of the Court of King's Bench being vacant, the barrister in question, subsequently known as Judge Willis, was offered and accepted it. On his arrival in Canada, he and Lady Mary, his wife, were well received by Sir Peregrine Maitland, at that time lieutenant-governor of the province, and the example thus set was generally followed by the society of York, as Toronto was then called. But before long, the new judge found himself at loggerheads with the entire official world of Upper Canada. Between him and his brethren of the Bench the relations were by no means cordial, and Attorney-General Robinson and he openly indulged in charges and recriminations that did not add to the dignity of the court.

In 1828 the chief justice, the Hon. Wm. Campbell, obtained leave of absence for six months and the consequence was that the Court of King's Bench was left with only two puisne judges, the Hon. J. P. Sherwood and Mr. Justice Willis. The feelings which

they entertained for each other were the opposite of friendly and this enmity made more pronounced, if it did not often give rise to, serious differences of opinion. Hardly a case came before them on which they found it possible to agree. But a wider breach was yet to come. Examining the constitution and powers of the court, Judge Willis felt himself forced to the conclusion that the absence of the chief justice invalidated the proceedings, and this conviction was followed by the grave decision that it was his duty to withdraw from the Bench. At the same time he expressed regret that he had entered at all on the discharge of judicial functions under such conditions. The announcement, as may be imagined, caused the utmost excitement. If the practice of the court had been wrong, everything theretofore done without the presence of the chief justice and two puisne judges was null and void, and uncertainty was cast over decisions which had been accepted without the least misgiving.

The result of his action was, however, altogether different from what Mr. John Walpole Willis had expected. Not only did the Judicial Committee of the Privy Council fail to sustain his view, but the law officers of the Crown expressed the opinion that his conduct justified his "amoval" from office and the appointment of a successor. Judge Willis, nevertheless, was not without supporters, among his sympathizers being Dr. Baldwin and his more famous son, Dr. Rolph and Mr. John Galt, the author, the father of Sir A. T. Galt.—*Gazette*.

A WRIT OF ELEGIT.

We had our judgment, but what were we going to do with it? The few sticks of furniture that garnished the defendant's domicile were covered by a bill of sale, duly registered and hopelessly unassailable. There was something mysterious about the whole affair. From our letter of application down to the present moment the debtor had made no sign. Our process-server had never seen him; none of the neighbours knew anything about him. Upon the statements of his wife and daughter, palpable, contradictory lies, we had procured substituted service, and no reason-

ble man could have read the affidavits upon which the order for such service was granted without coming to the conclusion that here was a plain case of willful evasion of the writ within the meaning of the act. We took the unusual course of notifying the defendant by letter that judgment had passed against him, and would have been glad to come to almost any kind of arrangement, but still he kept silence.

Things rested thus for some weeks when one day the plaintiff came to us with the welcome news that there was a row of cottages in a neighboring village, the rents of which were weekly collected by the debtor's wife. An examination of the assessment-roll confirmed our client's statement. The houses stood in the defendant's name, and he paid the taxes. A writ of *elegit* was quickly taken out and sent down to the sheriff at the county town. For reply, came a polite intimation that a considerable deposit (£20, if we remember right) was required by that functionary before taking any steps. This sent us to our books, and we found that we were embarking on a voyage of discovery amongst shoals of technicalities heretofore unexplored by any local practitioner. None of our friends could give us any assistance, for none of them had ever had occasion to procure a writ of *elegit* through its regular and lengthy career. However, our client was determined to see the thing through, and we made the deposit.

It was now for the sheriff to appoint a day, and summon a jury to decide the issue whether or not the lands and hereditaments described in our writ were in the true and lawful seisin of the defendant. The day being fixed, we subpoenaed the rate collector of the parish to attend with his books, and as an extra safeguard we took along the clerk to the assessors. These two worthies, average specimens of the rustic parochial official, were in a state of great trepidation at what they considered our most high-handed and unprecedented proceedings, but by dint of vigorous threats, combined with a liberal allowance of conduct money, we got them into line, and on the appointed day we all set off together for S., to go through a performance which, as the head of our firm declared, was as novel to us as if it had been an action in Japan.

Arrived at the county town we found the acting sheriff absent, and his place supplied, *pro tem.* by the most old fashioned attorney we ever had the good fortune to encounter. To look at him was to go back to the days when George the Third was king — tall, gaunt and ancient, his neck was enveloped in voluminous folds of not immaculate neck cloth. A veritable frill, worth three times its marketable value for the South Kensington Museum, protruded from his breast, and shone in strong relief against the dress-coat of rusty black, which completed his outward attire. His manner was a strange blending of dignified courtesy and nervous timidity. A poor, proud, foolish old man was he, but undeniably a gentleman. Whilst we were busy arranging our papers the jurors began to arrive by ones and twos. Most of them seemed rather bewildered. It was neither assize nor quarter sessions — what then were they wanted for? Where were the judge, the prisoner, the barristers, the audience? Each looked at his friend, and saw his doubts reproduced in his fellow's face.

As soon as the necessary twelve were present our ancient friend ascended the bench, and with an air that would have done credit to my lord chief justice, directed his clerk to swear the jury. This done, we opened our case, briefly explaining the purpose of our assembly, and proceeded to call our witnesses. Very strict and formal was the temporary judge, but everything was complete, and in a quarter of an hour we were ready for the verdict. Not so our worthy patriarch. It was not every day that he sat in the seat of the judges of the land, and accordingly he favored us with a most elaborate oration, disguised as a summing up, going into the whole history of the writ of *elegit*, and quoting statutes by the yard. The jury were evidently getting befogged, and when at last D. ceased, we should not have been surprised had they returned a verdict of accidental death, or any other irrelevant absurdity, such as usually close mock trials at sea. The clerk, however, kept them straight, putting the verdict, word for word, into the foreman's mouth, and so, after paying a few more fees, and cracking a bottle with the *quondam* judge, we got the sheriff's return, and started home.

Our client was now the legal owner of the property. Had it become necessary to transmute that legal ownership into actual possession we should have been compelled to go to chancery, and the papers actually went up to counsel to draw the petition, but in the meantime the defendant appeared on the scene, and the mystery was solved. The notices sent by us to the tenants to pay their rents into our hands broke the spell, and it appeared that this was the first intimation the poor fellow had ever received of the action. Old, bedridden and illiterate, he had, months before the account was given us for collection, sent his wife and daughter with the cash to pay our client. It was the only debt left outstanding from his former business, and he felt happy in the thought that he owed no man. His wife and daughter shamefully deceived him. They kept the money for their own purposes, and when our legal missiles rained upon them they artfully contrived to keep the old man in ignorance of every thing. It never crossed their stupid minds that the real property could be attacked. The original debt was £120; our costs amounted to nearly as much more, and in the end our client paid our bill, and took a mortgage on the property (which was of ample value) to cover the whole amount. Thus ended the struggle between the women and the law: our first and last experience with a writ of *elegit*.—A. B. M. in *Albany Law Journal*.

GENERAL NOTES.

A lawyer was prosecuting a horse case in a justice's court. Being desirous to have the horse exhibited in court, he issued *subpoena duces tecum* to the defendant to produce the horse. A new use to put this writ to, but we are advised in this case it secured the result desired.—*Kansas Law Journal*.

At the Sheriff's Court, Preston, on Wednesday, June 24, before a jury, the case of *McAlden v. Schnoerke* was tried. On April 24 last the plaintiff and the defendant were at an hotel in Barrow-in-Furness. The defendant asked the plaintiff to stir the fire, and while he was doing so poured a box of red dye over McAlden's head, observing that he was phrenologically feeling his bumps. The defendant then exclaimed, jocularly, "You will be a red devil for three months." The plaintiff tried to wash off the dye, but the more he rubbed the deeper the color became. His face and hair were stained, his collars, clothes and bedclothes soiled, and when he went into the street the boys and girls shouted,

"Red Indian!" He appeared in court with a finely polished scarlet countenance and a head of bright chestnut hair. The defendant, who was manager of the Flax and Jute Works, Barrow, had been in the habit of carrying a box filled with red powder, which he distributed as snuff, the effect being to dye his friends' nostrils a deep carnation. The damages were assessed at £20.

The Master of the Rolls, whose elevation to the House of Lords receives the hearty approbation of the legal profession, is to take the title of Lord Esber, from the well-known village in Surrey, in which he formerly lived, and where his brother, Major Sir Wilford Brett, K. C. M. G., lives. His predecessors in office who have been made peers are not numerous. They are Lords Romilly, Langdale, Gifford, Colepeper, and Kinloss. The last-named, who lies in the Rolls Chapel under his effigy in his robes of office, was Edward Bruce, a Scotch lawyer, who came to England with King James. Lord Colepeper was Master of the Rolls in days when law gave way to arms, and earned his title by his services in the field to King Charles I. The rest of the peers named were, like the new peer, distinguished lawyers. The eldest son of the Master of the Rolls is Mr. Reginald Brett, M.P. for Penryn and Falmouth, and private secretary to the Marquis of Hartington. The creation not only bestows a well-earned distinction, but secures to the public in the future the services in the highest Court in the country of one of its ablest lawyers.—*Law Journal*.

MIXED MARRIAGES.—There is a probability that the distressed heroine whose woes arise out of the fact that, being an Englishwoman, she marries a Frenchman, without any knowledge of the French marriage laws, will soon become out of date. Lord Granville recently replied to a letter on the subject from the Bishop of Manchester, to the effect that the Foreign Offices of London and Paris had agreed upon a form of certificate which should be issued by the French Consuls throughout the United Kingdom, before the celebration of marriages between French and English subjects. There can be no question about the value of such a document, setting forth that the requirements of the French code have been complied with to the satisfaction of the Consul issuing it. But it would be still better if it were known that such a certificate would be received in any French court of law as in itself constituting indisputable proof that an English marriage had been performed in strict accordance with French law. Having addressed an enquiry to the French Consulate on this point, we are politely informed by M. Cochelet, the Vice-Consul, that "the instructions received from the Foreign Office in Paris are silent on the subject." It should be added, indeed, that in a letter from M. Napoleon Argies, the solicitor to the Consulate, which was published a few weeks ago, that gentleman declares that when the Consular certificate has been obtained, the marriage "can be proceeded with, without risk of being annulled." This, of course, would be the natural assumption, from the formal nature of the document; but it would be more satisfactory if the inference of M. Argies were corroborated by an express declaration from the French Foreign Office.—*Pump Court*.

The Legal News.

VOL. VIII. OCTOBER 10, 1885. No. 41.

In the case of *The Queen v. The Bank of Nova Scotia*, an appeal from Prince Edward Island, the Supreme Court of Canada has given a decision in the same sense as that rendered by the Court of Queen's Bench at Montreal in *The Queen & Exchange Bank of Canada*, M.L.R., 1 Q.B. 302, the privilege of the Crown as simple contract creditor being maintained. The Bank of Prince Edward Island became insolvent, and a winding-up order was made on the 19th of June, 1882. At the time of its insolvency the Bank was indebted to Her Majesty in the sum of \$93,494.20, being part of the public moneys of Canada, which had been deposited by several departments of the Government to the credit of the Receiver-General. It appears that the first claim filed by the Minister of Finance at the request of the respondents, liquidators of the Bank of Prince Edward Island, did not specially notify the liquidators that Her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of \$65,428.95. On that day the respondents were notified that Her Majesty intended to insist upon her prerogative right to be paid in full. At this time the liquidators had in their hands a sum sufficient to pay the Crown claim in full. The following objection to Her Majesty's claim was allowed by the Supreme Court of Prince Edward Island—"That Her Majesty the Queen, represented by the Minister of Finance and the Receiver-General, has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to Her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company." On appeal to the Supreme Court of Canada, it was held, reversing the judgment of the Court below, that the right of the Crown, claiming as a simple contract creditor, to

priority over other creditors of equal degree cannot be disputed; that this prerogative privilege belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of a provincial corporation in a provincial court; that the crown can enforce this prerogative right in proceedings in insolvency under 47 Vict., ch. 23; and, lastly, that the Crown, by its acceptance of two dividends, had not waived its right to be preferred to other simple contract creditors. It will be remembered that the decision in the Exchange Bank case was based upon the civil law of the Province of Quebec, C.C.P. 611.

The cases under the English Vaccination Acts do not appear in the law reports, but it is well known from police statistics that numerous prosecutions have had to be resorted to before compliance with the law was secured. The victory of science over ignorance and prejudice has been gained inch by inch; in fact, it is not yet complete. The opposition to vaccination is of two sorts: first, there is the dread of the unknown, entertained by the ignorant, like a child's terror at being left in the dark; secondly, there is the more obstinate opponent of the order of mind now aptly expressed by the term "crank;" such an individual, for example, as will go round chuckling over one supposed case of trouble arising from vaccination, while at the same time he shuts his eyes to the certain fact that thousands have been swept away by failing to be vaccinated. It is not long since a case occurred in England, *Reg. v. Morby* (5 Leg. News, p. 241), in which a parent of this class was prosecuted for manslaughter, because he had refused to call a doctor to his son who was ill of smallpox and died without any medical attendance. Even in times when no epidemic is prevalent it is often a disagreeable task to enforce the law, because it involves sending the head of a family, who is otherwise a good citizen, to prison, and leaving his children without the means of support. The remedy now adopted in Montreal, of requiring all employees and their families to be vaccinated, is one which must prevail in every city where the manufacturing interest predominates. Employers hold the key to the position, for there is no

teacher so convincing as the pocket, and if all the employed and their employers are vaccinated, there will not be much trouble in dealing with the unemployed.

COUR SUPÉRIEURE.

MONTRÉAL, 4 juin 1884.

Coram LORANGER, J.

ROULBAU V. LALONDE.

Plaidoyer—Motion—Illégalités prima facie.

JUGÉ:—*Que lorsqu'une question a été soulevée par un plaidoyer au mérite, le défendeur ne peut, par motion, demander le renvoi de l'action pour les mêmes raisons mentionnées en son plaidoyer, quand même l'action serait illégale à sa face même.*

Le demandeur poursuit le défendeur pour la pénalité de \$200 accordée à toute personne qui en poursuivra la demande, par l'Acte des élections fédérales, contre les électeurs qui commettent des actes considérés frauduleux par cette loi.

Au mérite de cette action, le défendeur plaide, entr'autres choses, que cette action en est une qui tombe sous le chapitre 43 de 27-28 Vict., exigeant que toutes les actions qui *tam* fussent précédées d'un affidavit. Et que le demandeur a, dans cette cause, fait émaner le bref sans produire cet affidavit; que, par conséquent, le bref ayant été illégalement émané, l'action doit être renvoyée.

Subséquentement, le défendeur fit une motion par laquelle il demande, pour les mêmes raisons déjà mentionnées dans le susdit plaidoyer, que vu que le bref est nul à sa face même l'action du demandeur soit renvoyée.

Voici le jugement renvoyant la motion :

" La Cour, après avoir entendu les parties sur la motion du défendeur demandant le débouté de l'action, avoir examiné la procédure et délibéré :

" Attendu que le défendeur a soulevé par voie de contestation régulière le point invoqué dans la présente motion et que le litige est engagé sur cette contestation ;

" La Cour, sans adjuger sur le mérite même de la question, renvoie la motion du défendeur, avec dépens, etc."

Geoffrion, Rinfret & Dorion, avocats du demandeur.

Ousimet, Cornéliier & Lajoie, avocats du défendeur.

(J. J. B.)

QUEEN'S BENCH DIVISION.

TORONTO, Feb. 9, 1885.

Before WILSON, C.J., ARMOUR, J., O'CONNOR, J.

CONWAY V. CANADIAN PACIFIC RAILWAY CO.

Railways and Railway Companies, 42 Vict., ch. 9, 46 Vict., ch. 24 (D)—*Liability to fence.*

HELD, O'CONNOR, J., dissenting, *that under the Consolidated Railway Act 1879, 42 Vict., ch. 9 (D), as amended by 46 Vict., ch. 24 (D), the railway company are not bound to fence except as against a "proprietor or tenant" in occupation, and that the company are not liable to a mere squatter for the killing of his horses without other negligence than their omission to fence as against him.*

The meaning of the terms "Proprietor," "Tenant," and "Occupant," considered.

The plaintiffs claim compensation from the defendants for two horses, the female plaintiff's property, which were killed by a construction train of the defendants on their railway in the township of Ferris, on the 22nd of June 1884. The claim was made upon the ground that the plaintiffs were the occupants of the east half of lot 29, in the 14th concession of that township, that the defendants were bound to fence the line of their road as against her, according to the 46 Vict., ch. 24, sec. 9 (D), and its sub-sections, which repealed and amended 42 Vict., ch. 9, sec. 16 (D), and its sub-sections, and that the company had not put up such fence.

The question was, whether the female plaintiff was an occupant of the land in question within the meaning of the Act.

The case was tried at the Fall Assizes, at Pembroke, by Cameron, C.J., without a jury.

It appeared that the defendants, while constructing their road in that locality, put up some shanties for the accommodation of their men, and for their own purposes, and one of these shanties was used as a boarding house, the one which the plaintiffs claimed. The person who first kept the boarding house gave it up, and the plaintiffs went into it, and kept the boarding house about March, 1883, up to about November of that year. The female plaintiff said she went on the land, in June 1882, and her house, she said, was on the east end of the lot between lots 28 and

29, and they improved a little on the north side, and about an acre on the south side near the railway track, and that they cultivated what they could in 1883, she expecting then it was to be the defendants' land; that they went in there first as tenants of James Worthington, the manager of the construction work for the defendants; that the first three months they paid \$4.00 a month, and after that \$6 a month rent; that they paid him rent up to September, 1883, and two months later rent was paid to Salisbury, the pay master of the defendants; that they had since paid no rent to anybody, the rent being deducted by the defendants from her board bill for boarding the men; that she afterwards heard from the assessor that Mr. Worthington gave up his claim to the land, and that she paid taxes on it, and she applied in May, 1884, to the Crown land agent in Mat-tawa for it; that a part of the house occupied by her was not built by the company, and that she paid the man \$8 for that part, which she used as a kitchen; that she continued in that house, which was on the concession road, till the last of June, 1884, and until after the horses were killed; that she then went into the house upon lot 27, where the station was built, and bought an acre of it; that she was not located for it, but for lot 26; that she made the affidavit of 9th September, 1884, for the purpose of applying for the east half of lot 29; that it was a mistake in the affidavit that she was located for lot 27; it should have been for lot 26; that she was living on an acre she had of lot 27; that she was located for 26 in the spring of 1884, and applied for it before her horses were killed.

At the close of the evidence the learned Chief Justice found that the plaintiff entered into possession of a small portion of lot No. 29 in the statement of the plaintiff's claim mentioned, not exceeding two acres, under one James Worthington, who was a contractor for building the railway; that the land in question was part of the ungranted land of the Crown; that the greater part of the land in the neighborhood was in a state of nature; that the plaintiff paid rent to Worthington for the house up to November, 1883, and since that time the plaintiff had made application to the Crown Lands Depart-

ment to be allowed to purchase the lot, and that the Department had not as yet given any intimation to her as to whether she would be allowed to buy or not.

He also found that one Rangier was in possession of a small part of the lot, that George Quirt was in possession of part of the said lot, and claimed the right to become the purchaser of the same: and that since this action commenced, he and the plaintiff Catherine Conway had agreed to hold, she the east half and Quirt the west half of the lot; that the defendants were not guilty of any negligence, other than the omission to fence their railway over the said lot of land. He found the value of the horses killed by the defendant's train to be \$300, for which amount they were entitled to recover, if under the circumstances, the plaintiffs, or either of them were or was such occupants of the land that the defendants were bound to fence their railway across lot No. 29, in the pleadings mentioned; and he found that the plaintiffs were not such occupants; and that the defendants were not bound to fence their railway across the said lot; and he dismissed the plaintiff's action, with costs.

The shorthand reporter at the trial noted that his lordship said at the time of giving judgment that he was by no means free from doubt that he put a proper construction on the clause: that the first part of the section 46 Vic., ch. 24, sec. 9, required the railway company to fence where any part of the land was occupied, no matter how small a part, while the latter part of sub-section 2 only gave the right of occupation to the land in respect of which the fencing must be done; and the occupant of an acre was not the occupant of a whole lot, but only of a part of it; and that he thought it better to decide as he did, so that the matter might be settled by a review of his judgment.

November 29, 1884. *Oster, Q.C.*, and *M. J. Gorman*, moved to set aside the judgment, and enter it for the plaintiff, contending that the plaintiffs, being occupants of lot 29 in the 14th concession of Ferris, crossed by the defendants' railway, the defendants were bound by sec. 9, sub-sections 1, 2, 3, of 46 Vic. chap. 24, to fence where their line crossed this lot; and that, having neglected to do this, and the plain-

tiff's horses having, in consequence, got on the track and been killed, the defendants were liable, apart altogether from any question of negligence.

H. Cameron, Q. C., and W. R. White, contra. Plaintiffs being only trespassers, never having been located or obtained a license of occupation from the Crown, were not the legal occupants, as contemplated by the statute, and cannot compel the company to fence, and hence cannot recover. Before the amendment made by the section referred to, defendants would not be liable to the plaintiffs: see *Kilmer v. Great Western R. W. Co.*, 35 U.C.R. 595; *Wilson v. Northern R. W. Co.*, 28 U. C. R. 276; *Douglas v. Grand Trunk R. W. Co.*, 5 A. R. 585. The legislature could never have intended to compel the railway to fence against mere trespassers, for this would apply to any person living on any land whether belonging to the Crown or not. There would be no limit to the liability in such case. An occupant is a person who holds the title, or has the permission of the Crown to occupy it: see Wharton's Lexicon as to the meaning of occupancy.

February 9, 1835. *WILSON, C. J.* — The perusal of the evidence satisfies me that until November, 1883, the plaintiff had no right of occupation of any part of lot No. 29, but of the house which she rented from Mr. Worthington, and that she claimed nothing more at that time than as tenant to Worthington. She may have used part of the small cleared parts about the house and railway ground, but not as of right, and, as she said, she would have continued to pay rent after November, 1883, till she owned the land, if she had been asked for it; but she was not asked for it; because the work had gone further east than lot 29, and the men were not boarded upon that lot after that time. They were then boarded on lot 27.

The plaintiff, before the horses were killed, had been located for lot 26. She continued to live on the east half of 29 till after the horses were killed, that is, till about the last of June, 1884, and then she moved to lot 27, still keeping possession of the east half of 29, by having some of her goods and crops upon that lot.

In May, 1884, she wrote to the Crown

Land agent applying for the east half of 29. On the 9th of September, 1884, she made an affidavit, in which Dranley and Halliday joined, that she was head of the family, and had no son, but seven daughters, and that the land she applied to be located for was wholly unoccupied and unimproved.

That affidavit was not correct in several particulars.

1. She was not properly head of the family, for her husband was living.

2. She had a son.

3. The land was not wholly unoccupied, for there were several of the company's men still occupying shanties upon the lot; and at that time she had been located for No. 26, and lived upon No. 27.

It appears she never paid taxes upon the east half of 29 until the 27th of September, 1884, according to the receipt, although the receipt was not given till the 6th of October.

Mr. Gorman, the plaintiff's solicitor, wrote to the plaintiff, and Mr. Dranley received it for her about the end of September, in which he stated that neither the plaintiff nor Dranley could recover against the company for their horses which had been killed, unless it could be proved that they had some title to the lot; and the plaintiff said the letter stated by payment of taxes or something of that kind.

Then it appears that Halliday, the collector, claimed from Quirt \$15, being the sum said to be payable for the whole lot No. 29, who refused to pay that sum; but he paid about two months before the trial, in October, \$11.08, and, as well as I can make out, after the letter came from Mr. Gorman about proving title in Mrs. Conway by the payment of taxes, or something of that kind, Halliday told Quirt to the effect he would let his share of the taxes stand at the \$11.08, and he would get the rest of the \$15 from the plaintiff, and she then paid him \$3.90, making in all \$14.98 for the taxes for 1884.

It is also quite clear that after the receipt of Mr. Gorman's letter, Quirt was sent for on the 6th of October, about nine days before the trial, by the plaintiff, and by those assisting and advising her in this action, to appear before Mr. Shannon, the magistrate; and Quirt went to the place appointed, the plain-

tiff's house, and the result of what was then done was that Quirt was induced to give up to the plaintiff all claim to the east half of lot 29, the land in question, and to confine his claim to the west half only of the lot.

The whole country there is unfenced and a common, as the plaintiff said.

Now the question is, was the plaintiff an occupant of the east half of lot 29 at the time her horses were killed on the 2nd June, 1884? The statute now in force and applicable to this case is the 46 Vic. ch. 24, sec. 9, repealing and amending the 42 Vic. ch. 9, sec. 16, subsecs. 2 and 3.

It is not necessary to refer to the earlier Act further than to notice that it applied to "the proprietors of lands adjoining the railway," whereas the latter Act is more largely expressed. It was passed 25th May, 1883, and it is:

Section 16. "Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied.

2. Or, within three months, after such construction hereafter.

3. Or, before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon.

4. (And in the last case after the company has been so required in writing by the occupant thereof).

5. Fences shall be erected and maintained over such section or lot of land on each side of the railway, of the height and strength of an ordinary division fence.

6. With openings, or gates, or bars, or sliding or hurdle gates with proper fastenings therein, at farm crossings of the railway.

7. And also cattle-guards at all highway crossings, suitable and sufficient.

8. To prevent cattle and animals from getting on the railway.

9. But this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

Sub-section 2. "If after the expiry of such

delay, such fences, &c., are not duly made, and until they are so made, and afterwards, if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines to the cattle, horses, or other animals of the occupant of the land in respect of which such fences, &c., have not been made or maintained as the case may be, in conformity herewith."

In reading these enactments, the parts of section 16 which I have numbered, the parts to be considered in this case are Nos. 1, 5, 6, 7, 8, 9.

The part numbered 1 applies, because the railway was already constructed on this lot at the passing of the Act on the 25th of May, 1883, as the plaintiff said the company commenced running trains past this lot in the fall of 1882, and it is for that reason the parts numbered 2, 3, 4, do not apply.

The effect of the parts so numbered 1, 5, 6, 7, 8, is, that in the case of any railway constructed at the passing of the Act, on any section or lot of land, any part of which land is occupied, the company shall, within three months after the passing of the Act, fence over such section or lot on each side of the railway, with openings, &c., at farm crossings of the railway, and with cattle guards at all the highway crossings sufficient to prevent animals from getting on the railway.

Number 9 does not apply here, because no compensation of any kind has been given by the company, and besides it only applies when compensation is given for the dispensation of gates or bars, and has no relation to fences.

It is important, however, in this case, because it may enable us to some extent to place a better construction on the word occupied in number 1 of section 16, and the term occupant in sub-section 2, than if number 9 were not there. Number 9 then provides that the clause relating to gates or bars "shall not be interpreted to the profit of," that is, shall not apply to or be available for, any proprietor or tenant of any such section or lot, in case the proprietor has accepted compensation for dispensing with gates or bars.

The meaning of the statute is, that no one,

not even the proprietor or tenant, can claim to have the railway fenced off as against him, unless his land is occupied, and he or some one for him is the occupant of it.

The terms proprietor and tenant do, *ex vi termini*, mean a person having at least a defined and vested estate. I do not say the estate should be a strictly legal estate, or what before the Judicature Act would have been a trust estate, as valid in effect as a legal estate.

A person claiming the land as his own as against the legal owner, by any act of wrong as by a disseisin, dispossession or the like, might, I think, be considered a proprietor under this Act. That term is used plainly in opposition to the term tenant. There is no difficulty in determining the meaning of proprietor. It is, in my opinion, used to express the full ownership of the land by legal title, or by claim of title. If a person, in a contract for sale of land described himself as proprietor, that would be understood to mean that he was the owner of the property: *Rossiter v. Miller*, 5 Ch. D., 648; 3 App. Cas. 1124.

There is more difficulty about the word tenant. It means some lesser estate or interest than the actual ownership, and it means something more than mere occupancy.

A mere occupier of land is, by express enactment of the Assessment Act, R. S. O., ch. 180, sec. 6, sub-sec. 2, made liable for taxes when the occupation is not exempted by sub-sec. 1. See also sub-sec. 7. But that is because an occupant by wrong derives as much benefit by the property as one by title, and the municipality cannot be required to investigate the title of every one who is in occupation of land, whether it is by right or wrong, and it is just that the occupant, although without title, should be subject to the burdens of the municipality in like manner as those who hold by title.

So a person who has bought or agreed to buy Crown Lands, or who is located for land as a free grant, is subject to taxation for such land, although no license of occupation, location ticket, certificate of sale, or receipt for money paid on a sale, has issued; and although no payment has been made on the land; or although part of the purchase-money is overdue and unpaid; although such person is not in occupation of the land, and although

he has not a very secure title, and perhaps no title at all without a license of occupation under the R. S. O. ch. 23, sec. 15; and yet the interest of a person having a claim under the Assessment Act, section 126, may be sold under the R. S. O., ch. 23, sec. 18, although no license of occupation has been issued.

I am of opinion that if a license of occupation has issued to the locatee or purchaser of Crown land under ch. 23, sec. 15, such person may properly be considered to be a tenant under 46 Vic. ch. 24, sec. 9, if in actual occupation of the land, because such person may maintain actions against any wrongdoer as effectually as he could do under a patent from the Crown, and he may assign his interest in the land; and I am also of opinion that a person who has no license of occupation, &c., but who has a claim and right of occupation of his lot under section 126 above referred to, if in occupation of his land, may also be considered to be a tenant of the land under the 46 Vic. ch. 24.

In this case the plaintiff has no license of occupation, or any kind of other right or title to the land. She made application for the land, but whether she will be allowed to purchase it or not, if she desire to purchase it, or whether it will or will not be allotted or assigned to her under "The Free Grants and Homesteads Act," R. S. O., ch. 24, if she desire to get it as a free grant, has yet to be determined. It is very probable she may not be located for it, and it is quite certain she ought not to be, for she was, before the time her horses were killed, and at the time she made her affidavit to be located for this land, already located for lot No. 28, and her application for this land was in direct violation of section 7 of the Free Grants Act.

I am of opinion, therefore, the plaintiff cannot be considered to be within the terms of the 46 Vic., c. 24, s. 9, under the term occupant in that section, and she certainly neither was nor is a proprietor or tenant of the land.

The defendants had the right under the 42 Vic., ch. 9, sec. 7, sub-sec. 3, with the consent of the Governor-in-Council, "to take and appropriate for the use of their railway and works so much of the wild lands of the Crown lying on the route of the railway as have not been granted or sold, and as may be necessary

for such railway." And the R.S.O., ch. 165, sec. 9, sub-sec. 3, is in the like terms, excepting that the consent of the Lieutenant-Governor-in-Council is required. And I think it may be assumed here that such consent has been given to the company. Now, the defendants did take and appropriate the part of this lot north and south of their railway before the plaintiff was in possession, and they have shanties on it also, and some of their workmen are in possession of them, and that possession had not, at the time when the horses were killed, been in any way abandoned; and the defendants were quite as much in possession of the land, if not more so, than the plaintiff was.

I am of opinion, also, the plaintiff was not in fact, an occupant of the land at all at the time when, &c. She had rented the house she occupied from the contractor of the road, and paid him rent for it; and she never, by any act further than by writing a letter in May, 1884, to the Crown Lands Agent, applying to be located for the land, had extended her possession or occupation before the time when, &c., beyond the possession which she had during the time of her paying rent for the house she was put in possession of. And her conduct, aided by Dranley, who thought to strengthen his own claim against the company by strengthening her right, under which she claims, by the payment of \$3.90, the balance of taxes claimed from but not paid by Quirt, and the affidavit made by the two before the Crown Lands Agent in September, and the agreement got from Quirt, all just a few days before the trial, showed a scheme to make out a title to the land to which she had no kind of right.

I cannot say I regret the conclusion I have come to, for although the plaintiff has sustained a serious loss by the destruction of her horses, it was very much her own fault in turning them loose as she did, when the horses would be almost certain to roam in the small clearing made by the cutting of the railway line, and for the erection of the shanties required for the workmen, and for the defendants' other purposes; and it would be a great and useless expense, to force the company to fence both sides of the railway along the lots which were occupied, while

gaps are left all along the unoccupied lots, through which cattle and horses could always escape on to the line, so long as the occupiers had no side fences to keep their animals from wandering on to the adjacent lots, and getting on to the railway through the gaps.

Upon the whole I am of opinion the motion must be dismissed, with costs.

O'CONNOR, J. The plaintiffs as occupants of the east part of lot 29 in the 14th concession of the township of Ferris, in the district of Nipissing, brought this action to recover the value of two horses killed on the railway of the defendants by a locomotive and train of the defendants passing thereon.

The railway at that place was not fenced off from the adjoining lands. The horses were killed on the 2nd June, 1884. The railway had been constructed across this lot 29 in the early part of 1883.

The only question for decision is, whether the plaintiffs were "occupants" or rather, perhaps, whether the female plaintiff was "occupant" of any part of said lot 29, within the meaning of the 16th section of the Dominion Act 46 Vic. ch. 24.

Section 16, Consolidated Railway Act, 1879, required the railway company, within six months after any lands had been taken for the use of any railway, if required by the proprietors of the adjoining lands, to erect fences with gates, &c., at farm crossings of the road, for the use of the proprietors of the land adjoining the railway, &c.

This clause is repealed and amended, and one substituted for it, by the 9th section of the 46th Vic. ch. 24, above mentioned, which enacts:—

Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied, or within three months after such construction hereafter fences shall be erected and maintained over such section or lot of land on each side of the railway, of the height and strength ... with openings or gates ... at farm crossings ... sufficient to prevent cattle and animals from getting on the railway, but this is not to apply to any proprietor or tenant who shall have accepted compensation for dispensing with the erection of such gates or bars.

Thus it is apparent that the case turns altogether on the construction of the amended and substituted section 16 of section 9 of the Amending Railway Act 46 Vic. chap. 24, as applied to the fact of occupancy by the plaintiffs, or either of them. Although the plaintiffs are a husband and wife, living together, yet the wife appears to have been regarded as the business manager, and the owner of the horses, as well as the occupant of the land.

It appears to me that there is no inconsistency between the first part of the amended clause 16 and sub-sec. 2, as, according to the reporter's note, was intimated by the learned Chief Justice.

The first part of the main section creates and enjoins the duty, and is specifically precise and apt in its language, as it ought to be in a case which interferes with the common law.

In sub-sec. 2, the expression: "The occupant of the land in respect of which such fences," &c., "have not been made or maintained," is only used referentially, that is with reference to the previous specific enactment in the first part of the section, and it must be construed in that way.

It was also urged on the argument that there was an inconsistency between the first paragraph of the main clause, as construed by counsel for plaintiffs, and the last paragraph thereof, wherein the expression "proprietor or tenant" occurs, and the word "occupant" does not occur; and the expression "proprietor or tenant" controlled the word "occupied" in the first part of the section.

I think the argument is fallacious. The apparent repugnancy is capable of a rational explanation.

The two parts of the clause are consistent with each other. A proprietor or tenant would each have a fixed and certain interest in the land to be affected by the omission to put up gates, &c., and each could release and discharge the railway company from the obligation to erect and maintain for a compensation according to his interest in the land. But the occupant, having no right but that of a mere occupant, or what is commonly called a squatter, could have no fixed or certain interest to be permanently affected by the omission, and his release would be valueless. This

construction, I think, strengthens rather than weakens the position of the plaintiffs. The clause, as it stood originally in the "Consolidated Railway Act, 1879," applied to proprietors only, but the same word has been construed by the Courts in England, in dealing with the similar Act there, to include tenants also.

What, then, was the object of the amended and substituted clause 16 in the Act of 1883, 46 Vic.? Was it not to give a remedy to persons like the plaintiffs, who were neither proprietors nor tenants? I am unable to conjecture anything else, or to give any other than an affirmative answer to the former question, or than a negative to the latter.

And this view appears to me to be confirmed by a survey of the situation, and a review of the facts, as regards the Canadian Pacific Railway.

It had been constructed through the settled portion of the country, where the lands were in the hands of proprietors, who were in a position to deal with the company, give the notice required by the Act, if they desired that the company should erect fences, and gates, &c., as provided by the Act, or to release them from the obligation of putting up gates, &c., if they chose to do so.

But the company were then constructing the railway, through forest land of the Crown, where some settlers were going in and occupying lands along or in the neighborhood of the line or route of the railway.

These settlers had no title, except that of mere occupancy, being neither proprietors nor tenants in the legal or ordinary sense of the terms.

At the place in question, and along the route of the railway westward through the Province, or the greater part of it, the lands were not ready or had not been offered for settlement by the Crown Lands Department, and no title but of mere occupancy, coupled with the vague though usually respected right of pre-emption, could be obtained. These settlers required cattle to enable them to get along; the cattle were as liable to be killed by the railway as if their owners were proprietors of the lands, and the killing of them was no less an injury to the owners than it would be if they were proprietors of the lands.

[To be continued.]

The Legal News.

VOL. VIII OCTOBER 17, 1885. No. 42.

In 1883 it was enacted that "every appeal from interlocutory judgments (*sic*) shall be inscribed by the clerk of the Court, and heard by privilege, in a summary manner, without any reasons of appeal or factums." 46 Vic. c. 26, sec. 6. An application was made by the successful party in a case at Quebec (Oct. 8) to tax a *factum* which he had filed. After consultation a majority of the judges, (Dorion, C. J., Monk, Ramsay, Cross, Baby, J.J.) were of opinion that the proper interpretation of the section referred to was that the *factum* was not obligatory, not that it was prohibited, and that any party could still file a *factum*, for which he would be entitled to charge in his taxed bill if successful, but that there should be no delay to file it. The object of the enactment was to shorten the delays in these appeals, not to render their decision more difficult.

In the opinion of Mr. D. Macmaster, Q.C., on the Riel case, reference is made to the adverse authority of Mr. Justice Stephen, in his Digest of Criminal Law. We may add that in Mr. Justice Stephen's "Digest of the Law of Criminal Procedure," (A. D. 1883) p. 2, it is stated that "the criminal law of England extends to high treason, misprision of treason, and concealment of treason committed out of the realm of England by any subject of Her Majesty," and reference is made to the statute 35 Hen. 8, c. 2.—The case is to be heard before the Judicial Committee of the Privy Council on the 26th inst.

The books contain a few cases which may be cited with reference to small-pox. One bears upon the responsibility of physicians in performing vaccination. In *Landon v. Humphrey*, 9 Conn. 209, it was held that the physician, while he does not guarantee the specific value of the vaccine virus, yet guarantees its freshness; so that if he inoculate a patient with virus in an altered state, constituting as it then would mere putrid animal matter, and erysipelas or injury to

any limb necessitating amputation should ensue, he will be held responsible for the suffering, loss of time, and permanent injury to the patient. It is also the duty of a physician to take all possible care to prevent the spread of small-pox or other contagious disease. So, where the paper upon the walls of a room in which there had been small-pox patients had become so soiled and smeared with the small-pox virus as to make its removal necessary, a physician or other attendant may order the paper to be torn down, and it was held in *Seavey v. Treble*, 64 Me. 120, that the landlord cannot maintain an action against the physician for doing this.

In England it is an indictable offence for a physician, or any one else, unlawfully and injuriously to carry along or to expose in a public highway, on which persons are passing, and near to the habitations of others, any person infected with the small-pox, or any contagious disorder; and it is for the accused to show that the object of the carrying or exposure was lawful; *Rex v. Burnett*, 4 M. & S. 272; *Rex v. Sutton*, 4 Burr. 2,116; *Rex v. Vantandillo*, 4 M. & S. 73. These cases are referred to in Rogers, "Law and Medical Men."

Inoculation for the small-pox has been referred to as a thing actually performed in some recent cases. In England, since 1840, it has been an indictable offence to inoculate for the small-pox; 3 & 4 Vic. cap. 29, sec. 8. 30 & 31 Vict. cap. 84, sec. 32. And by 16 Vict. (Can.) cap. 170, s. 1, it was made an indictable offence in Canada: Consol. Stat. Can., cap. 39, sec. 1; and the license of any physician contravening the Act thereby becomes null.

The following paragraph from an English paper shows how even subordinate judges are remunerated in England:—

"At a recent meeting of the corporation of the city of London, it was decided to raise the salary of the assistant judge of the Mayor's Court from £1,800 to £2,000 per annum. Mr. Woodthorpe Brandon, who now occupies the post, has been in office since 1873, having formerly been registrar of the court, in which position he enjoyed an income greater than he hitherto received in his judicial capacity."

The salary as now arranged is just double that of the judges of our Court of Queen's Bench and Superior Court.

COUR SUPÉRIEURE—MONTREAL.***Certiorari—Règlement de la Cité de Montréal—Billards et Pools.**

Jugé :—Qu'une table de *pool* n'est rien autre chose qu'un *billard*, et qu'un règlement de la cité de Montréal imposant une taxe de \$100 sur les billards comprend également les tables de *pool*.—*Vincelette v. De Montigny, et La Cité de Montréal*, Loranger, J., 2 février 1885.

Saisie-conservatoire—Bail—Cession de biens—Insolvabilité—Intervention—Droits du syndic.

Jugé :—1o. Que les cessions de biens faites à un syndic pour le bénéfice des créanciers, ne donnent pas le droit au syndic cessionnaire d'intervenir dans une saisie des biens du débiteur insolvable par un créancier, pour réclamer, en sa dite qualité, la possession des effets saisis ; cette cession n'a aucun effet vis-à-vis les tiers, et ne peut lui permettre d'ester en justice ni pour le cédant, ni pour les créanciers du cédant.

2o. Qu'un bail de meubles pour une certaine somme représentant leur valeur, avec la condition que lorsque la somme stipulée sera payée les meubles seront la propriété du locataire, est parfaitement régulier et constitue bien un louage et non pas une vente.—*May v. Fournier*, Mousseau, J., 23 avril 1885.

Meubles—Vente judiciaire—Adjudicataire—Tiers—Saisie—Revendication.

Jugé :—Qu'en l'absence de fraude ou de collusion, un tiers, propriétaire de meubles qui ont été saisis et vendus judiciairement, n'a aucun droit en revendication contre l'adjudicataire qui en a payé le prix, son recours est sur le produit, s'il n'est pas encore distribué, ou s'il l'est, contre le saisissant pour la valeur du meuble.—*Mackie v. Vigeant*, Mathieu, J., 25 juin 1885.

Mise en demeure—Demande de paiement—Lieu de paiement—Vente de marchandises—Lettre—Usage du commerce.

Jugé :—1o. Qu'un marchand qui poursuit sur compte pour marchandises vendues et livrées est tenu, comme dans les cas ordinaires, de faire personnellement ou par procu-

reur, avant l'action, une demande de paiement au domicile du débiteur ; que la demande faite par lettre du marchand, par envoi de compte ou par lettre d'avocat est insuffisante.

2o. Que la coutume ou l'usage du commerce ne peut prévaloir contre une disposition formelle de la loi.—*Smardon v. Lefebvre*, Jetté, J., 31 mars 1884.

Société commerciale—Dissolution—Paiement des dettes—Garantie.

Jugé :—Que lorsqu'à la dissolution d'une société commerciale, l'un des associés assume le paiement de toutes les dettes, l'autre associé, contre lequel les créanciers de la société auraient obtenu des jugements conjointement et solidairement, ne peut obtenir une condamnation personnelle contre celui qui s'est chargé des dites dettes, et faire déclarer que les biens de la société sont son gage et doivent le garantir contre les jugements des créanciers, mais qu'il a seulement contre lui une action en garantie.—*Brouillet v. Bogue et al.*, Mathieu, J., 25 juin 1885.

Exception à la forme—Timbres judiciaires—Alias bref de sommation—Informalités.

Jugé :—1o. Que lorsque le demandeur ne rapporte pas son action le jour du retour, et qu'il est, en conséquence, forcé de prendre un nouveau bref, ce dernier ne peut être considéré comme un *alias*, et le montant des timbres judiciaires qui doit y être mis lors de son émanation et de son retour est le même que sur le premier.

2o. Que le bref de sommation n'a de forme légale et met le défendeur en demeure de comparaître en cour, qu'en autant que le montant des timbres judiciaires fixé par la loi y a été apposé lors de son émanation et de son retour ; que l'informalité résultant du défaut des dits timbres rend l'action nulle et elle peut être déboutée sauf recours sur exception à la forme.—*Riendeau v. Cusey*, Chagnon, J., 15 avril 1885.

Action qui l'est—Indivisibilité de l'action—Compensation—Garantie.

Jugé :—1o. Qu'une action pénale n'est ni divisible, ni compensable ; qu'en conséquen-

*To appear in full in Montreal Law Reports, 1 S.C.

ce, un plaidoyer de compensation fait à une action de cette nature sera renvoyée sur réponse en droit.

20. Qu'en matière pénale, il n'y a pas lieu à la garantie; qu'il s'ensuit que, dans une action *qui tam*, le défendeur ne peut, par demande incidente, appeler le demandeur en garantie.—*Normandin v. Berthiaume*, Mousseau, J., 20 octobre 1884.

Police d'assurance—Prescription—Conditions—Propriété—Femme commune—Autorisation maritale—Réticence.

Jugé:—10. Que la condition mis au dos d'une police d'assurance contre le feu, que tout recours légal contre la compagnie d'assurance qui a émis la police est prescrit après le laps des douze mois qui suivent la date de l'incendie, n'a rien d'illégal, et que cette prescription doit être mise en force.

20. Qu'une femme commune en biens et sous puissance de mari ne peut valablement faire assurer les meubles de son ménage sans l'autorisation de son mari; et que le fait de n'avoir pas ainsi déclaré son état à la compagnie d'assurance rend nulle la police d'assurance.—*Rousseau v. La Compagnie d'Assurance Royale*, Taschereau, J., 6 juin 1885.

Achat et vente—Billet promissaire—Terme—Compensation.

Jugé:—10. Qu'en matière commerciale, lorsque l'acheteur néglige de donner au vendeur un billet promissaire, tel qu'il aurait été convenu, ce dernier peut, alors et avant l'expiration du terme, poursuivre l'acheteur pour le montant de la vente.

20. Qu'il peut aussi, dans le cas précédent, offrir le montant de la vente en compensation à l'encontre d'un billet promissaire dont l'acheteur réclame le paiement contre lui.—*Quintal v. Aubin*, en Révision, Torrance, Rainville, Jette, J.J., 20 juin 1883.

Douaire coutumier—Enregistrement—Créance antérieure ou préférable—Adjudicataire—Nullité de décret.

Jugé:—10. Que lorsqu'un douaire coutumier a été enregistré sur un immeuble, une créance ayant la priorité de date et d'origine,

mais enregistrée sur le même immeuble subséquentement au dit douaire, ne constitue pas "*une créance antérieure ou préférable*," purgeant le douaire coutumier dans le sens de l'article 710 C.P.C. qui n'a trait qu'à l'antériorité de rang, et à la préférence à raison d'un privilège en vertu des lois réglant les privilèges, les hypothèques et l'enregistrement des droits sur les immeubles.

20. Qu'un adjudicataire qui connaît personnellement qu'au moment de l'adjudication l'immeuble par lui acheté est affecté d'un douaire, ne peut subséquentement demander la nullité du décret et de son contrat d'acquisition, à raison de cette cause d'éviction éventuelle qu'il connaissait.—*Lizotte v. Deschemaux*, En Révision, Torrance, Papineau, Jetté, J.J., 30 décembre 1884.

Mandat—Procuration générale—Achat—Tiers.

Jugé:—Qu'une procuration générale dans les termes suivants: "Je vous autorise à conclure tous contrats que vous jugerez à propos avec les cultivateurs pour la culture, cette année, de la betterave à sucre et aussi les travaux pour sa culture," n'autorisait pas le mandataire d'acheter des cultivateurs des betteraves à sucre, et ne pouvait lier le mandat vis-à-vis des tiers pour le prix d'achat de ces betteraves.—*Jarry v. Sénécal*, Mousseau, J., 13 juin 1885.

Action qui tam—Acte des élections fédérales—Affidavit—Fin de non-recevoir.

Jugé:—10. Que l'action pour recouvrer la pénalité imposée par l'acte des élections fédérales est une action *qui tam* qui doit être précédée d'un affidavit sous le statut 27-28 Vict., ch. 43.

20. Que le dit acte des élections fédérales (37 Vict., ch. 9) n'a pas soustrait ces actions à la nécessité d'être précédé d'un affidavit.

30. Que cette absence d'affidavit est une fin de non-recevoir qui peut être invoquée au mérite.—*Rouleau v. Lalonde*, Cimon, J., 14 mars 1885.

Pari—Enjeu déposé entre les mains d'un tiers—Droit d'action—Paiement.

Jugé:—Que lorsque dans un pari la somme d'argent parée a été placée entre les mains

d'un tiers, celui qui a gagné a un droit d'action contre le tiers pour s'en faire remettre le montant, ce dépôt étant assimilé à un paiement; C. C. 1927.—*Rienneau v. Blondin*, Rainville, J., 12 novembre 1880.

Succession vacante—Insolvabilité—Légataires universels et particuliers—Réduction de legs—Renonciation—Droits des curateurs.

JUGÉ:—1o. Que tous les biens d'une succession insolvable ne sont pas le gage des créanciers de préférence aux légataires particuliers, de manière à ce qu'ils puissent empêcher ces derniers de prendre possession de leurs legs; s'il doit y avoir réduction des legs particuliers pour payer les dettes du testateur, les créanciers ont une action contre les légataires à ce titre pour obtenir cette réduction, mais il ne peuvent faire mettre au nom d'un curateur nommé à la succession insolvable tous les biens du testateur.

2o. Que la renonciation d'un légataire universel unique ne rend pas la succession vacante s'il reste d'autres héritiers au testateur.

3o. Qu'un curateur nommé à une succession vacante par la renonciation des légataires ou héritiers n'a que les droits qu'auraient eu ces légataires ou héritiers.—*La Banque Ville-Marie v. Rocher*, En Révision, Johnson, Torrance, Loranger, JJ., 30 avril 1885.

Inscription en Révision—Contestation d'élection municipale—Appel.

JUGÉ:—Qu'un jugement final rendu par la Cour Supérieure sur une requête en contestation d'élection municipale ne peut être inscrit en Révision, ce jugement n'étant pas susceptible d'appel; et une inscription ainsi faite en Révision sera rejetée sur motion.—*Beauchemin v. Hus*, en Révision, Doherty, Loranger, Cimon, JJ., 30 mai 1885.

Bail—Réparations—Dommages—Résiliation.

JUGÉ:—Qu'un propriétaire qui, en faisant des réparations à sa maison, emploie des matériaux émanant des odeurs infectes, lesquelles causent des dommages à son locataire, sera condamné à payer le montant de ces dommages en sus de la résiliation du bail.—*Levesque v. Daigneault*, En révision, Sicotte, Gill, Loranger, JJ., 30 mai 1885.

QUEEN'S BENCH DIVISION.

TORONTO, Feb. 9, 1885.

Before WILSON, C.J., ARMOUR, J., O'CONNOR, J.
CONWAY v. CANADIAN PACIFIC RAILWAY CO.

Railways and Railway Companies, 42 Vict., ch. 9, 46 Vict., ch. 24 (D)—*Liability to fence.*

[Continued from page 328.]

On the other hand, it was no more trouble or expense to the company to fence in the one case than in the other: but their doing so as regards occupants under such circumstances would be an encouragement to actual settlement.

Under these circumstances the Amending Act of 1883 was passed, I think, in all probability, for the protection of people situated, in respect to occupancy, as the plaintiffs were.

It is immaterial whether different parts of the lot were occupied by several persons or not.

If a village had been formed at the place in question of such occupants, it could make no difference, except to increase the necessity for fencing, if there was an increase of cattle.

That the plaintiffs entered the house which they occupied as the tenants of and paid rent to Worthington, could make no difference. Whether his tenants or not they were in occupation. However, Worthington, as appears by the evidence, abandoned the house when his contract was completed, and after November, 1883, the plaintiffs continued in possession independently, cultivated a small portion of the land, used another part for pasture, made an effort to obtain title, as recognized settlers, from the Crown Lands Department, and were awaiting an answer, expected to be favorable to their application, when the horses were killed.

The term "occupied," as used in this clause, must be construed in its ordinary grammatical meaning; in that meaning which naturally and obviously belongs to it, and has been given to it in common language.

It is not a technical term, but one of the common understanding of mankind, and as such in common use; Wilberforce on Statute Law, p. 122; Hardcastle, pp. 26, 27, 74.

As to what occupancy is,—“Occupancy is the thing by which title was in fact originally gained; every man seizing to his own contin-

ued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else." Blackstone (by Kerr, 4th ed.) vol. ii, p. 74.

"Occupancy is the taking possession of other things, which before belonged to nobody." 2 Broom & Hadley's Commentaries, p. 411. The plaintiff's case, in this instance, greatly resembles and is strongly supported by the English case of *Dawson v. The Midland R. W. Co.*, L. R. 8 Ex. p. 8.

If the foregoing is not the correct interpretation of the amending act in question, I know not what it means, or that it means, or can mean, anything.

Falling short of that, it means, as I apprehend, nothing different from, or more than, the Act which it purported to amend. The Amending Act, then, is meaningless and idle. But I am not disposed to take this view of what I conceive to be an important Act of Parliament, having a useful and just object in view, and which is expressed with sufficient clearness and precision by the Act itself. It is unnecessary, therefore, to look for indicia outside of the Act, for they can only afford help to give it a forced instead of a natural interpretation.

I think judgment should be entered for the plaintiffs for \$300 and costs.

ARMOUR, J. The word "owner," as used in the Consolidated Railway Act of 1879, is therein to be understood to mean any corporation or person who, under the provisions of that Act, would be enabled to sell and convey lands to the company; sec. 5, ss. 14: and the word "lands" is to include all real estate, messuages, lands, tenements and hereditaments of any tenure; sec. 5, sub-sec. 6. The railway company shall set forth in its book of reference a general designation of the lands intended to be passed over and taken therefor, and the names of the owners and occupiers thereof, so far as they can be ascertained; sec. 8, sub-sec. 1, a. and b. "Any omission, mis-statement, or erroneous designation of such lands, or of the owners or occupiers thereof, . . . may . . . be corrected;" sec. 8, sub-sec. 5. "The lands which may be taken without the consent of the proprietor thereof shall not exceed," &c., sec. 9.

All corporations and persons whatever,

tenants in tail or for life, *grévés de substitution*, guardians, curators, executors, administrators, and all other trustees whatsoever not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes covert*, or other persons seized, possessed of, or interested in any lands, may contract, sell and convey unto the company all or any part thereof: sec. 9, sub-sec. 3. "After one month, &c., application may be made to the owners of lands, or to parties empowered to convey lands, or interested in lands, which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway, and, thereupon, agreements and contracts may be made with such parties touching the said lands, or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained as may seem expedient to both parties, and in case of disagreement," &c., sec. 9, sub-sec. 10.

"Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied, or within three months after such construction hereafter, or before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon (and in the last case after the company has been so required in writing by the occupant thereof), fences shall be erected and maintained over such section or lot of land on each side of the railway, &c., but this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars;" 46 Vic. ch. 24, sec. 9. sub-sec. 16.

"If, after the expiry of such delay, such fences, gates and cattle-guards, are not duly made, and until they are so made, and afterward if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines to the cattle, horses or other animals

of the occupant of the land in respect of which such fences, gates, or guards have not been made or maintained, as the case may be, in conformity herewith."

These last two clauses were by 46 Vic. ch. 24, sec. 9, substituted for the following clauses in the Consolidated Railway Act of 1879:

"Within six months after any lands have been taken for the use of the railway, the company shall, if thereunto required by the proprietors of the adjoining lands, at their own costs and charges, erect and maintain on each side of the railway fences," &c.: sec. 16, sub-sec. 1.

"Until such fences and cattle guards are duly made, the company shall be liable for all damages which may be done by their trains or engines to cattle, horses, or other animals on the railway," sub-sec. 2.

"The term 'proprietor,' as used in the Act, is included within the term 'owner,' and the word 'owner,' as defined in the Act, would seem to include only those corporations and persons mentioned in sec. 9, sub-sec. 3, and would thus include proprietors and tenants; and by the Consolidated Railway Act of 1879, sec. 16, it was only as against such owners of adjoining lands that the railway company were bound to fence.

What difference, then, do the clauses substituted for section 16 in the Consolidated Railway Act by the Act 46 Vic. ch. 24, sec. 9, make in the law as it stood before the passing of the latter Act? Are the railway company bound to fence as against any one but an "owner" as defined by the Act? He is no longer required to be the owner of adjoining lands; it is sufficient if he be the owner of any part of a section or lot upon which the railway has been constructed, or a part of which has been taken possession of by the company for the purpose of constructing a railway thereon; but I think he must be an "owner" within the meaning of the Act, which term, as I have above said, includes proprietors and tenants; and I think the word occupied in the substituted clause means occupied by the owner, that is, the proprietor or tenant thereof; for where there is a tenant, both he and his landlord are owners within the meaning of the Act; and I think the term "occupant" in the substituted clause

means owner, that is, proprietor or tenant, and I think the use of the terms proprietor and tenant so occupying in the substituted clause, in the connection and manner in which they are used, shows this to be the true construction of the clause.

The clause will then read as follows: "Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied by the proprietor or tenant thereof, or within three months after such construction hereafter, or, before such construction, within six months after any part of such section or lot of land has been taken possession of by the company, for the purpose of constructing a railway thereon, and in the last case, after the company has been so required in writing by such proprietor or tenant thereof, fences shall be erected and maintained over such section or lot of land, on each side of the railway, &c.; but this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

"If, after the expiry of such delay, such fences, gates, and cattle guards are not duly made, and until they are so made, and afterwards if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines, to the cattle, horses or other animals of such proprietor or tenant of the land in respect of which such fences, gates or guards have not been made or maintained, as the case may be, in conformity herewith."

This construction brings all parts of the clause into harmony, and is, I am satisfied, having regard to the various provisions of the Act which I have above quoted, the true construction to be put upon the clause.

The provisions of the Act respecting line fences, R. S. O. c. 198, entirely support this construction, and the question under discussion has to be considered to some extent with reference to these provisions.

It is not reasonable to suppose that the Legislature intended that the railway company should be bound to fence against any

person who should without any title whatever, and as a mere trespasser, occupy any part of a section or lot upon which the railway has been constructed, or a part of which has been taken possession of by the company for the purpose of constructing a railway thereon, and that, too, when such person would not be compellable by, nor could he compel, his adjoining owner to make, keep up and repair a just proportion of the fence which marks the boundary between them.

The plaintiff was a person precisely in this position, and so was Worthington, to whom she at one time paid rent.

I think, therefore, that the company were not bound to fence as against her, and that the order *nisi* must be discharged with costs. See *Douglas v. London and Northwestern R.W. Co.*, 3 K. & J. 173; *Re Evans*, 42 L. J. Chy. 357.

Order *nisi* discharged, with costs.

THE RIEL CASE.

An opinion by Mr. D. Macmaster, Q.C., on the case of Louis Riel, now under sentence of death, has been made public, in which a new point of general interest has been raised. The learned counsel says:—

The prisoner was indicted at Regina, in the Northwest Territories of Canada:

1. For levying war against Her Majesty "in the said Northwest territories of Canada, and within this realm," while a subject of Her Majesty, and

2. For levying war while living in Canada and enjoying Her Majesty's protection.

He was tried by a stipendiary magistrate, a justice of the peace, and a jury of six, under the provision of "The Northwest Territories Act, 1880," convicted, and sentenced to be hanged.

My legal opinion is now asked:—

1. Upon the competency of the court that tried him, and

2. Upon the legality of the conviction and sentence.

I.

The court which tried the prisoners was, in my view, legally—though exceptionally—constituted in virtue of special delegations of legislative power from the Imperial to the Canadian Parliament.

II.

The indictment is framed under the statute 25 Edward III., cap. 2, which has never been formally re-enacted as a law of the Dominion of Canada. How far it may be in force in the Northwest Territories as part of the common law is open to some question, owing to the restricted language of the statute of Edward.

The indictment is for levying war against Her Majesty "in the Northwest Territories of Canada and within this realm." The statute 25 Edward III., is, as it expresses, "A declaration which offences shall be adjudged treason," and among these is, "If a man do levy war against our Lord the King in his realm."

Are the Northwest territories a part of the realm within the meaning of the statute of Edward? Referring to this statute Sir Matthew Hale says that "Ireland, though part of the dominion of the crown of England, yet is no part of the realm of England." . . .

"The like is to be said for Scotland, even while it was under the power of the crown of England, as it was in some times of Edward I. and some part of the time of Edward III." The Court of Queen's Bench of Ireland has decided that the same statute of 25 Edward III. only became applicable to Ireland by the provisions of 10 Henry VII., cap. 10, passed by the Irish Parliament, introducing it into Ireland. The House of Lords subsequently confirmed the decision of the Irish court. Sir M. Hale thus discusses the clause in 25 Edward III.:—"Now as to this clause of high treason: *Ow si home levy guerre contre notre Seigneur le Roy en son realme.*"

"To make a treason within this clause of this statute there must be three things concurring:—

"1. It must be a *levying of war*.

"2. It must be a levying of war *against the king*.

"3. It must be a levying of war *against the king in his realm.*"

The italics are used by the learned jurist. After stating that Ireland and Scotland are not within "the realm," as before stated, he continues: "And the same that is said of Ireland may be said in all particulars of the Isle of Man, Jersey, Guernsey, Sark and

Alderney, which are parcels of the dominion of the Crown of England, but not within the realm of England as to this purpose concerning treason."

In a celebrated case of treason, it was held that the words: "This realm," "meant the United Kingdom of Great Britain (excluding Ireland) and nothing else."

A prisoner who had stolen goods in Guernsey and brought them into England was arrested and committed for trial in England. Mr. Justice Byles, at the Devon Summer Assizes, 1861, after consultation with Baron Channell, held that Guernsey not being a part of the United Kingdom, the prisoner could not be convicted of larceny for having the goods in his possession here, nor of receiving them in England.

The following joint opinion was given by the attorney and solicitor-general, Sir Robert Henley, and the Hon. Charles Yorke, in 1757:—

"MY LORDS,—In obedience to your lordships' commands, signified to us by Mr. Pownall by letter dated April 1st, 1757, accompanied with an enclosed letter and papers, which he had received from Jonathan Belcher, Esq., chief justice of His Majesty's colony of Nova Scotia, relating to the case of two persons convicted in the courts there of counterfeiting and uttering Spanish dollars and pistareens, and requiring our opinion, in point of law, thereon; we have taken the said letters and papers into our consideration, and find that the question upon which the case of those two persons convicted of high treason depends is this: Whether the Act of Parliament, 1 Mary, c. 6, entitled, "An Act that the counterfeiting of strange coins (being current within this realm), the Queen's sign-manual or privy seal, to be adjudged treason," extends to Nova Scotia, and is in force there, with respect to the counterfeiting Spanish dollars and pistareens in the said province?"

And we are of opinion, first, that it doth not; for that the Act is expressly restrained to the counterfeiting of foreign coin current within this realm, of which Nova Scotia is no part.

Secondly, we are of opinion that the proposition adopted by the judges there, that the inhabitants of the colonies carry with them the statute laws of the realm, is not true, as a general proposition, but depends upon circumstances; the effect of their charter—usage, and acts of their legislature; and it would be both inconvenient and dangerous to take it in so large an extent.

The statute 25 Edward III., is simply a definition of the crime of high treason. By

that definition it is high treason to levy war against the King in his realm.

From the authorities cited it would seem that it is of the essence of the offence that the levying of war should be within the realm.

Mr. James Fitzjames Stephen, in his Digest of the Criminal Law, says that it is treason to levy war against the Queen in her Dominions, and refers in a foot-note to the statute under consideration and the works of Sir Matthew Hale. He does not explain his reasons for using the term "dominions" for "realm," though his definition is no doubt better adapted to the present conditions of the Queen's world-wide sovereignty. His digest, however, does not always express the law as it is and was objected to on this ground by the Chief Justice of England when it was proposed by legislative action to convert the digest into a criminal code. Mr. Justice Stephen did not pretend that his digest in all cases expressed the law as it is. He aimed not merely to consolidate but to improve the criminal laws. I could not, however, in fairness overlook the definition of so great an authority as Mr. Justice Stephen, though I do not think it impairs the force of Sir Matthew Hale's interpretation of the statute. The value of Sir Matthew Hale's constructions, Mr. Justice Stephen himself concedes in his History of the Criminal Law in these words:—"The Act 25 Edw. III., is still the standard Act on which the whole law of treason is based, and the constructions put upon its different members by Coke, Hale, Foster and others, have been in many instances adopted by the court, and must still be taken to be part of the law of the land."

Upon the whole, there is fair ground for argument that the North-west Territories of Canada are not within "the realm" as intended by the statute of Edward, and if not, it is doubtful if that statute can be made to apply to offences committed there, without more express enactment.

The difficulty here presented is obviated in the United States by a clause in the constitution which declares that: "Treason against the United States shall consist in levying war against them, or adhering to their enemies, giving them aid or comfort."

The object of the statute of Edward was to define and limit the matters which should be adjudged treasons, and to prevent the Sovereign from making arbitrary encroachments upon the life, liberty, and property of his subjects by resort to prosecutions for ill defined and constructive treasons.

The validity of the conviction and sentence might be tested by an application to a judge of the Supreme Court of Canada for a writ of *habeas corpus*. There is an appeal from the decision of a judge in such case to the full court.

The Legal News.

VOL. VIII. OCTOBER 24, 1885. No. 43.

The Judicial Committee of the Privy Council heard the appeal of Louis Riel on the 21st inst., and on the following morning an opinion was read by the Lord Chancellor, holding that the Court of first instance had jurisdiction, and affirming the conviction. The points determined in this case at Winnipeg are summarized as follows by the editor of the *Manitoba Law Journal*, who was of counsel for the prisoner:—

1. A stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, may try any charge of murder or treason in the North-West Territories.
2. The information may be laid before a stipendiary magistrate alone. An associate justice of the peace is necessary for the trial only.
3. Except for the purpose of arrest, it is not necessary that there should be an information at all; nor need the trial be based upon an indictment by a grand jury, or a coroner's inquisition. All that is necessary is a charge, and this need not be under oath.
4. The evidence may be taken in short-hand.
5. Writs of *certiorari* and *habeas corpus* cannot be issued by the Court of Queen's Bench in Manitoba to bring up the papers and prisoner upon an appeal to that Court.
6. The Court of Queen's Bench will hear an appeal in the absence of the prisoner.

The September-October numbers of the *Montreal Law Reports*, Superior Court series, contain pages 389 to 448. Thirty-three cases are reported. Among these may be mentioned the case of *Elliot v. Lord*, extending the privilege of the plaintiff for costs of suit, so as to include all costs in appeal up to the final judgment of the Privy Council. In *Riendeau v. Blondin*, an action by a person who had won a bet against the stakeholder was maintained. In *Levesque v. Daigneault*, the action of a tenant was maintained, to resiliate the lease and recover damages

caused by the use of wall paper which communicated an offensive smell to the goods of the tenant. In *Jones v. Laurent*, arbitrators appointed to value a property were compelled by writ of *mandamus* to admit evidence of the annual revenue as a basis of valuation. In *Brazier v. Léonard*, it was decided that the person expending money for the feed and care of a horse has a lien on the animal for his disbursements. In *Smardon v. Lefebvre*, it was held that a lawyer's letter is not a *mise en demeure* within the meaning of 1152 C. C.

Mr. Justice Taschereau, in the case of *La Municipalité du Village du Mile End v. La Cité de Montréal*, decided, on the 14th inst., that the power to legislate with reference to health matters and hospitals (with the exception of marine hospitals and quarantine) is vested in the local legislature. There is no doubt that this judgment is in accordance with the current of decisions on the subject. The late Mr. Loranger inserted the provisions of ch. 38 of the Consolidated Statutes of Canada in his draft of consolidation of the Statutes in force in Quebec, and his successor Mr. Würtele, in a letter which has been shown to us, says he will "not recommend that they be struck from the roll." The following are in substance the reasons given in Mr. Justice Taschereau's judgment: The petition, it may be observed, was for a writ of injunction to prevent certain buildings belonging to the Provincial Government, situated within the limits of the municipality, and known as the Exhibition buildings, from being used as a smallpox hospital:—

Considering that the plaintiffs, petitioners, have not shown any right of property or any interest in the ownership of the land and buildings mentioned in their petition, permitting them to apply to this court to obtain the writ of injunction asked for;

Considering that the plaintiffs, petitioners, have not shown that they had, as a municipal corporation having under their control the land and buildings in question, any sufficient interest to support the allegations and conclusions of their petition;

Considering that the petitioners have not established to the satisfaction of this court

that the works and operations complained of are in contravention of any of the by-laws of the said municipality or constitute any danger to the inhabitants and rate payers of the municipality ;

Considering that it is established that the works and operations above mentioned have been executed by and on behalf of the local Board of Health of the city of Montreal with the permission, authority and sanction of the Central Board of Health of the province of Quebec, duly appointed by the Lieutenant-Governor-in-council and after proclamation duly issued and published under chapter 38 of the Consolidated Statutes of Canada, putting in force within the said province the provisions of the said act ; that said works and operations have, moreover, received the express sanction of the executive of this province, which, furthermore, has permitted the Central Board and the local Board of Health the use and occupation of the lands and buildings known under the name of the Exhibition buildings, which lands and buildings are the property of the Government of the province of Quebec, though under the temporary control of the Council of Agriculture of the province of Quebec ;

Considering that the defendant (the city), by the effect of the said proclamation and of the nomination of central and local boards of health, has ceased to have the powers, authority and duties which devolved upon it before the issue of the said proclamation ; that from the date of said proclamation and the nomination of said boards, the latter have been invested with all the powers entrusted to them by the said act, ch. 38 of the C. S. C. ; that in virtue of these powers they took possession of said lands and buildings, and have performed the works in the public interest and with the sanction of the executive ;

Considering that the defendant does not appear to have intervened, and had no right to intervene, in the proceedings or acts of said central and local boards of health, and that the petition, so far as directed against the city of Montreal, should in any case be dismissed ;

Considering that said chapter 38 C. S. C., is still in full force and effect, and could not

be repealed or abrogated by any legislative disposition of the Dominion Parliament, seeing that by the B. N. A. Act, 1867, all questions of health, control of hospitals other than marine, and generally all matters of a purely local or private nature within the province are within the exclusive jurisdiction of the Provincial Legislature, which alone had the right to amend or repeal the said statute, and has not done so ; Petition dismissed with costs.

It is curious with what tenacity some antiquated and unreasonable customs are adhered to in England. One of the jury in a recent case of *Regina v. Malcolm*, writes a letter which furnishes an illustration. He says : " We had breakfast on Friday at eight A.M., sat patiently listening to counsel and judge till a few minutes before 3 P.M., when we retired ; and, instead of sitting down to satisfy our cravings, we were locked into a room with bare boards, and coolly told that neither food nor drink would be supplied until we gave in our verdict ; and by way of further exasperation, we were informed that, in an adjoining apartment, luncheon was prepared and ready for us as soon as we agreed. After that, we had four more hours' wrangling amongst hungry and thirsty men—eleven hours in all of a process of exhaustion." It seems that although under an Act passed in 1870, the judge is authorized to allow the jury the use of a fire and reasonable refreshment *at their own expense*, the bailiff who takes charge of them when they retire to consider their verdict, is still sworn, in a case of felony, to keep them "without meat, drink or fire, candle-light excepted." How would this sound if applied to a bench of judges and yet judges and jurymen under our system have often precisely similar functions to discharge.

LONDON LETTER.

The approaching end of the long vacation is shown by the gradual return of those who have been ruralizing or pleasure-seeking these last six weeks. In the common-rooms, in the squares about the Inn, you come upon friends with darkened complexion, and lacking the glossy hat and long coat so proper to

these precincts; or else you hear, every now and again, greetings exchanged by those who parted last week in Norway, or in the Highlands, or on the banks of Lake Lucerne.

But those of us who were in the old haunts at the close of last month had an opportunity of witnessing a most remarkable and indeed unprecedented trial at the Old Bailey. Upon an indictment for bigamy, the most conflicting and yet positive evidence was offered as to the identity of the prisoner, it being maintained, for the Queen, by the prosecutrix, her mother and the parson, that the man in the dock was he who had married himself to the prosecutrix, while the prisoner, on the other hand, by a cloud of witnesses, differentiated himself and established an *alibi*. The suspicious element, however, of the defence is that the man charged, who is a Londoner, was unquestionably in Brighton where the crime was committed, at the same house, and at nearly the same time. The jury, amid these bewildering facts, were unable to agree, and the case must be tried again. The offender, whoever he was, had only remained a few days with his inamorata, and then had disappeared, so that the poor woman is in the position of knowing that she is tied for life to somebody who is little better than a myth.

A vast deal of discussion and passion, and sentiment has been expended upon what is known as the scandal of the *Pall Mall Gazette*; and Stead, the editor of that paper, together with some other such philanthropists, stand to take their trial for abduction and assault at the Old Bailey.

At the Old Bailey, last month, the first instance occurred, under the new act, of a prisoner tendering himself as a witness on his own behalf.

A recent decision of the Reviser of Votes in Chelsea must cause great surprise in the colonies and particularly in India. The suffrage of a man born in Calcutta was disallowed, on the ground that he was not a subject of the Queen of England, but merely of the Empress of India, and therefore an alien in this country. But the proposition has been combated by Mr. Louis de Souza in a letter to the *Times*, showing on the authority of *Calvin's case*, in the time of King James the first,

that an "alien" is one who is not only *extra ligentiam nostri regis*, but also *infra ligentiam alterius*; and that allegiance "cannot be confined to one kingdom," and that all subjects of the Queen, in any title, are equally within her allegiance in every part of her dominions. Otherwise it might happen, that if a native of Calcutta, or of Jersey (which is an appendage of the ancient dukedom of Normandy) should league with rebels here to dispossess the Queen of Her English throne, he would not be within the Statute of Treasons as levying war "in the realm" nor as a "subject" abroad aiding traitors here.

The mention of this matter reminds me to say that public interest is now almost wholly concentrated on the impending elections, which are the nearer, because the date of dissolving the present parliament has just been made known.

Lincoln's Inn, 10th Oct., 1885.

SUPERIOR COURT—MONTREAL*

Capias—Forme de la déposition—Il peut reposer pour partie sur un jugement.

JUGÉ:—1o. Que l'allégation dans la déposition pour *capias*, "que le défendeur a caché, soustrait et recélé ses biens, et est sur le point de cacher ou soustraire et receler ses biens avec l'intention de frauder ses créanciers en général ou le demandeur en particulier," est suffisante.

2o. Qu'il n'y a pas non plus d'incertitude dans l'allégation, "que le défendeur est sur le point de quitter immédiatement la Province du Canada, comprenant les Provinces de Québec et d'Ontario, avec l'intention de frauder ses créanciers en général ou le demandeur en particulier," et que cette allégation est aussi suffisante.

3o. Qu'en faisant émaner le *capias* en cette cause, tant pour le montant d'un jugement déjà rendu en faveur du demandeur, que pour une autre créance dont il était porteur, le dit demandeur n'a en rien violé la loi, le *capias* ayant été valablement émis comme procédure distincte et séparée du jugement en question.—*Sentécal v. Hart, Jetté, J.*, 25 fév. 1885.

* To appear in full in *Montreal Law Reports*, 1 S.C.

Vente de foin—Contrat sous seing privé—Domages-intérêts.

Par contrat sous seing privé en date du 26 octobre 1880, le défendeur s'obligea livrer au demandeur, dans sa cour, à Montréal, quand il en serait requis (as required), à compter de la date de ce contrat jusqu'au 1er mai 1881, 50 tonnes de foin, de première qualité, à \$13 la tonne, formant un prix total de \$650. Avant le 1er mai 1881, le vendeur ne livra à l'acheteur que 23½ tonnes du foin en question et il restait encore 26½ tonnes non livrées, représentant une balance de \$342 pour le prix de cette dernière quantité. Le 23 mai 1881, le vendeur fut mis en demeure de livrer à l'acheteur la balance du dit foin, mais ne tint aucun compte du protêt.

Jugé :—1o. Qu'aux termes de ce contrat, le défendeur n'était tenu de livrer au demandeur le foin en question, *que s'il en était requis avant le 1er mai 1881 et jusqu'à cette époque, MAIS PAS PLUS TARD.*

2o. Que l'époque fixée par le dit contrat pour la livraison du foin en question, était de l'essence du contrat, et que le défendeur n'était pas tenu et ne pouvait valablement être requis de le livrer après cette époque.—*Larin v. Kerr*, En Révision, Torrance, Jetté, Gill, JJ., 29 avril 1882.

Parts ou actions—Souscription—Cause d'action—Juridiction—Exception déclinatoire.

Le défendeur fit, du district de Kamouraska, application à une compagnie incorporée, à Montréal, pour des parts qui lui furent accordées par les directeurs, à cette dernière place. Plus tard, il fut poursuivi pour des versements sur ces parts. L'action fut intentée à Montréal et signifiée au défendeur dans le district d'Ottawa où il était domicilié.

Jugé :—Que toute la cause d'action n'ayant pas originé dans le district de Montréal, le consentement du défendeur à prendre les dites parts ayant été donné dans un autre district, la Cour, siégeant à Montréal, n'avait pas de juridiction.—*Ross et al. v. Rouleau*, En Révision, Sicotte, Jetté, Mathieu, JJ., 31 mai 1885.

Compagnie d'Assurance — Risque — Incendies antérieures—Réticences—Nullité.

Jugé :—Que lorsqu'une compagnie d'assu-

rance refuse d'assurer, parce que déjà plusieurs fois des bâtisses semblables à celle qu'on cherche à assurer, appartenant au même propriétaire, ont été incendiées, chaque fois dans les mêmes circonstances, ce fait doit être déclaré par l'assuré lors de la demande pour une nouvelle assurance, comme étant de nature à étendre le risque, et la réticence de l'assuré sur ce point est une cause de nullité du contrat. C. C. arts. 2485-2487.—*Minogue v. Quebec Fire Assurance Co.*, Mathieu, J., 30 avril 1885.

Société—Convention préalable—Défaut d'exécution—Résolution de contrat.

B., cessionnaire de partie du droit d'exploiter une patente, dans la Province de Québec, fait avec L. ce contrat : "*L. désireux de s'associer à cette exploitation paye à B. la somme de \$1,000 comptant à condition de partager également, etc.... Ce dernier (B.) s'engage à se rendre à Québec et à consacrer son temps, son travail et son énergie à mettre ce projet à exécution, et se fait fort de mettre en marche la compagnie projetée avant le 15 novembre prochain.*"

Jugé :—Que dans le cas où B. n'a pu remplir ses obligations et mettre en marche la dite compagnie pour l'exploitation de la patente en question, avant le délai fixé, ce contrat ne peut être considéré comme un acte de société, et L. a droit de faire résilier le dit contrat et de faire condamner B. à lui remettre les \$1,000 par lui payées.—*Laviolette v. Bossé*, En Révision, Sicotte, Torrance, Mathieu, JJ., 31 mars 1883.

Nourriture et soins donnés à un cheval—Droit de rétention—Saisie-revendication.

Jugé :—Que celui qui nourrit un cheval et en prend soin et qui le dresse pour la course au trot, a sur ce cheval et les objets à son usage, tels que harnais, licou, &c., un droit de rétention pour sûreté du paiement de tels nourriture et soins et pour l'avoir ainsi dressé pour la course.—*Brazier v. Léonard*, Papineau, J., 27 décembre 1882.

Registrar—Tariff—Certificate furnished to Sheriff.

HELD :—That a registrar, when furnishing to a sheriff a certificate as to several lots of

land sold, is not entitled to make separate certificates for each lot sold, when but one requisition covering all has been filed with him by the sheriff.—*Morris v. Canadian Iron & Steel Co.*, Mathieu, J., June 11, 1885.

Judicatum solvi—Prête-nom.

JUGÉ:—Que le fait qu'une personne qui réside dans la Province de Québec, et y intente une action, n'est que le prête-nom d'une autre personne résidant en dehors de la dite province, n'est pas suffisant pour obliger le demandeur à fournir le cautionnement *judicatum solvi*.—*Reed v. Rascony*, Mathieu, J., 13 mai 1885.

Compagnie de chemin de fer—Passager—Arrêt de trains—Responsabilité—Imprudence.

JUGÉ:—1o. Qu'une compagnie de chemin de fer qui vend un billet de passage d'un endroit à un autre sur sa ligne, et qui collecte ce billet du passager dans un de ses chars, est tenu d'arrêter ce train à l'endroit indiqué sur le dit billet et sera tenue responsable des dommages qu'elle cause à ce passager si elle ne le fait pas.

2o. Qu'en pareil cas, si le passager saute en bas du train lorsqu'il est en mouvement, et se fait des blessures graves, ce fait constitue une imprudence de sa part que la Cour doit prendre en considération pour diminuer les dommages à être accordée à cette personne.—*Larreau v. Vermont Central R.R. Co.*, Gill, J., 11 mai 1885.

Amendement—Compensation—Réponses et répliques.

JUGÉ:—Que le demandeur, après avoir inscrit sa cause pour enquête et fait entendre plusieurs témoins, ne peut être admis à suppléer, par amendement à ses réponses ou répliques, à l'insuffisance des allégués de sa déclaration, en offrant de compenser certaines réclamations contenues dans le plaidoyer du défendeur et offertes en compensation par un compte additionnel.—*Lalonde v. Rochon*, Loranger, J., 18 novembre 1884.

Cour Supérieure—Jurisdiction—Montant réclamé—Retraxit.

JUGÉ:—Que lorsque, après l'émanation d'un bref de sommation et sa signification au dé-

fendeur, mais avant l'entrée de la cause en cour, le demandeur fait signifier au défendeur un *retraxit* de partie de la somme réclamée, suffisant pour réduire cette somme au-dessous de \$100, la Cour Supérieure n'a pas de juridiction pour juger l'action qui sera renvoyée sur un plaidoyer du défendeur.—*Saxton v. Paradis*, Sicotte, J., 14 octobre 1884.

Mandamus—Arbitrators—Value of Property—Principle of Valuation.

Held:—1. That when arbitrators appointed to value a property, proceed upon an erroneous basis in law, and refuse to admit the best evidence of value, an interested party may obtain a writ of mandamus against the arbitrators to compel them to admit such evidence.

2. That the best mode of ascertaining the value of a property for purposes of expropriation, is to establish its market value, and such value should be based upon the annual revenues of the property.—*Re Expropriation of St. John's Bridge*, Jones et al. & Laurent et al., Torrance, J., June 26, 1885.

Cadastral Plan—Subdivision of Lots—Sheriff's Sale.

Held:—1. That, although a block of land may have been subdivided on the official plan, the sheriff is not bound to sell the official subdivisinal lots separately, if they have not been defined on the ground and if the land is used as a whole.

2. That the sheriff may be ordered by a judge in Chambers to seize and sell the land as a whole.—*Gale et al. v. Canadian Iron & Steel Co.*, Mathieu, J., Dec. 26, 1884.

Sheriff's Sale—Tariff—Subdivisional Lots.

Held:—That if a block of land composed of several subdivisinal lots is seized and sold as one, the sheriff is not entitled to charge the 50 cents per extra lot provided for by the tariff for extra lots.—*Gale et al. v. Canadian Iron & Steel Co.*, Mathieu, J.

Execution—C.C.P. 606—Privilege for costs.

Held:—That the plaintiff's privilege for the costs of suit under C.C.P., Art. 606, ss. 8, includes the costs incurred up to final judg-

ment in appeal; and so, where the plaintiff obtained judgment in the Superior Court against three defendants jointly and severally, and the judgment was reversed by the Court of Queen's Bench sitting in appeal, and on appeal to the Privy Council the original judgment was restored, it was held that the plaintiff was entitled to be collocated by privilege on the proceeds of the moveables of the defendants for all costs up to and including the final judgment of the Privy Council.—*Elliot v. Lord et al., & Atkinson*, oppt., In Review, Torrance, Loranger & Cimon, JJ., Sept. 30, 1885.

Ejectment—Action by proprietor of one undivided half in usufruct—"Grosses réparations."

Held:—1. That the proprietor for one undivided half in usufruct may bring alone an action in ejectment against the tenant; but he cannot of himself lease the premises subject to his usufruct.

2. "Grosses réparations" do not include the putting on of a new roof.—*Ross et vir v. Stearnes et al.*, Torrance, J., Aug. 22, 1885.

Certiorari—Jurisdiction—Cour des Commissaires—Municipalités de Ville.

Jugé:—1o. Que pour enlever à une cour sa juridiction, il faut une loi expresse et formelle.

2o. Qu'une Cour des Commissaires créée pour une paroisse conserve sa juridiction, lorsque subséquemment le territoire de la paroisse est érigé en municipalité de village ou de ville; et que les personnes assignées devant cette Cour peuvent être décrites comme étant du dit village ou de la dite ville.—*Ex parte Lemoine v. Doré, Mathieu*, J., 9 juin 1885.

CIRCUIT COURT.

MONTREAL, October 7, 1885.

Before JOHNSON, J.

LE COLLEGE DES MÉDECINS ET CHIRURGIENS DE LA PROVINCE DE QUÉBEC v. THEOBALD CHIVÉ.

Practising Medicine without a license—Assuming to be a physician—42 & 43 Vic. c. 37 (Q.)

Held:—1. That a druggist who recommends a tonic or a lotion for a particular ailment, and who sells the customer such tonic or lo-

tion, charging him merely the ordinary price of the preparation, is not guilty of practising medicine without being a registered licensee in accordance with 42 & 43 Vic. c. 37 (Q.)

2. That a druggist who was formerly a doctor of Rouen, and who sells bottles of medicine with the label "Dr. Chivé, ex-interne des hopitaux de Rouen" thereon, is not liable for assuming the title of physician.

PER CURIAM. (No. 3465.) This was an action for \$50 penalty under the Stat. 42 & 43 V., c. 37 and amendments, for practising medicine without being a registered licensee (10th April, 1883.)

Two instances are specified: First, one Ad. Martel, whom he treated, and received thirty cents; second, Jos. Archambault, whom he also treated, and got eighty cents, (20th March, 1884.)

He pleads that he never practised medicine contrary to the statute, but that he is a licensed chemist and druggist, and has a right to sell and recommend his drugs and wares, and that he did no more. Secondly, he pleads prescription.

The plaintiff, in his declaration, alleges that the reason he did not bring the action before was the absence of the defendant from the province.

There is no evidence of practising medicine or prescribing it, in the sense of the statute. In the first case, the man Martel was suffering pain from inflammation of the bladder, and told the defendant so, and the latter recommended a lotion or a liquid in a bottle for which he charged thirty cents. This would seem a small fee for a prescription by a physician, and was evidently only the price of the physic or stuff that he sold and had a right to sell. In the second case, the witness says he was weak and wanted a tonic, and got two bottles for which he was charged and paid forty cents each. It would be straining the law to apply it to such a state of facts as this. The defendant is proved to be a licensed druggist, and he had a right to recommend his wares, and receive the price of them, which is all he did. I see nothing about prescription or limitation of action in the statute, and nothing was cited, but that is unimportant under the evidence.

No. 3,466. This is another case against the same man for another and different offence, under two sub-sections of sec. 88, i. e., for illegally assuming the title of doctor, physician, or surgeon, or any other name implying that he is legally authorized to practice medicine or surgery, etc., or for assuming in an advertisement, a written or printed circular, or on business cards or signs, a title, name or designation of such a nature as to lead the public to suppose or believe that he is a registered or qualified practitioner of medicine, etc.

There is a demurrer pleaded to this action; but I think the allegations are sufficient. They say that the defendant held himself out as a practising physician by printed labels on bottles of medicine which he sold, by using the words *Dr. Chivé* on them. But there is besides a specific allegation that he has assumed a designation of a nature to cause it to be supposed that he is practising as a physician. Therefore, if he has by these labels or otherwise assumed that designation to himself, so as to have the effect alleged, it is sufficient. The plea to the merits is the same as in the other case.

There are two labels on which the words "*Dr. Chivé*" appear: one on a bottle of "*extract of tobinambour for flavoring ice cream, custards, etc.*" The other is said to have been removed from a bottle, and reads "*Pharmacie normale. Elixir bechique pulmonaire du Dr. Chivé, ex interne des hôpitaux de Rouen, remède souverain pour la guérison des toux, etc., etc.*"

The questions are, did defendant assume a designation for himself, or were the printed labels of a nature to cause it to be supposed that he was a practising physician here? It could not be doubted, I think, that this man, who pleads and proves that he is a licensed druggist, has a right to sell flavoring extracts or cough remedies. The only possible doubt would be whether in selling and labelling them in this manner he meant to pass himself off as a licensed doctor here. The words "*Dr. Chivé*" are there on the two bottles. Do they refer to himself or to another Dr. Chivé of Rouen? or if they refer to himself cannot he say lawfully that he was once Dr. Chivé of Rouen, (and I have no doubt of the fact from the certificate of the mayor of Candélier, which is produced), and that he now

sells under his druggist's license here the things he learned to make there? There are three other bottles also produced. They neither of them have the words "*Dr. Chivé*" on them, but "*Dir. Chivé*," which is said to signify that he is, and wants to be known as *directeur* of this "*Pharmacie Normale*," which he keeps, and has a right, under his license, to keep. It may be, perhaps, a device or trick—and that is what is contended for by the prosecution; but there are two reasons why I do not act upon that view of the case. First, in a penal action, I want clear proof; second, the principal witness in the case, and indeed, admittedly, the instigator of it, is Dr. Thayer, who says he bought out this man's business a couple of years ago on condition he was not to return and resume it, but that he has returned and resumed the business, and is now being sued by this same person for \$10,000 damages. That is not evidence of a kind that I can implicitly rely upon to convict of an offence against this statute, where the intent of the party is to be made apparent, an intent which is only attempted to be shown, not so much by direct proof as by the inferences and reasoning of this witness. I think there is a fair doubt whether the defendant meant to pass himself off as a doctor, or merely to vend under his druggist's license, things that were made by another, or even by himself in another country where he could truly call himself a doctor. There is a case very much resembling this one, reported in last February's *Canada Pharmaceutical Journal*, and where the Court took the same view of the matter that I do now, and I agree with what was said there, that I do not interpret the act as applying to such cases; and I do not think that it is in the interests of the public to have such restrictions placed on the sale of medicines as would result from the success of such a case as this.

Upon the whole case—and considering the whole extent of the evidence, I think that the defendant cannot fairly be held to have assumed to practice as a doctor here because he said on his labels that when he was in France, he had been a doctor there, and made stuff which he sells here under his license as a druggist.

Both actions are dismissed with costs.

B. Nantel, for plaintiff.

Archambault, Lynch, Bergeron & Mignault, for defendant.

COUR DE CIRCUIT.

MONTREAL, 25 sept. 1885.

Coram CARON, J.

EDMOND LARBEAU V. E. LECLERC.

Lettre d'avocat — Frais — Règlement — Promesse de payer.

JUGÉ:—*Que l'avocat n'a pas d'action pour recouvrer les frais de lettre écrite au défendeur, si ce dernier règle la dette avec son créancier, même en promettant de régler la dite lettre avec l'avocat; que cette promesse ne pouvait le lier vis-à-vis l'avocat, puisqu'il s'engageait à une chose à laquelle il n'était pas légalement tenu.*

Au soutien de sa prétention le demandeur cita les décisions suivantes:—10 R. L. p. 589, Gill, J.; 6 L. N., p. 8, Loranger, J.; 27 L.C.J. p. 29 ou 6 L.N., p. 61, Jetté, J.; 3 L. N. p. 37, Rainville, J.

Le défendeur cita 7 Leg. N. p. 383, décision rendue en 1884 par son Honneur le Juge Loranger.

Au sujet des décisions citées par le demandeur, son Honneur le Juge Loranger a prétendu qu'elles étaient d'équité parce que la preuve établissait que "des rapports avaient eu lieu entre le débiteur qui avait reçu la lettre et l'avocat qui l'avait écrite."

Dans l'espèce il fut établi en preuve que la femme du défendeur avait offert 50c. pour la lettre, après avoir promis au créancier de payer tous les frais de lettre.

La cour fut d'opinion que cette promesse ne pouvait lier le défendeur, que les frais de lettre d'avocat n'étaient pas recouvrables.

L'action fut en conséquence déboutée avec dépens.

Edmond Lareau, avocat du demandeur.

Augé & Lafortune, avocats du défendeur.
(J. J. B.)

GENERAL NOTES.

THE COURTS AND THE EPIDEMIC.—Mr. Justice C. sat in the Circuit Court a few mornings ago hearing all comers with his usual patience, justice and urbanity. An individual, who appeared to receive a wide berth from advocates and criers, pushed his way to His Honor with a handful of papers and desired to be heard, when the following dialogue occurred:—His Honor—You say you are sued in ejectment and you have the smallpox in your house? Defendant—Yes, Your Honor, and I want you to examine these papers. His Honor (to the public)—This is a shame. This man

has been after me several times this morning to examine his papers, and I have told him to go home and I will continue his case. (To the Clerk) Who is the lawyer in this case? Clerk—Mr. B. His Honor—Perhaps Mr. B. would be kind enough to come here and examine these dirty papers himself, as the action appears to be an action in ejectment for \$3. (To the Crier) Put him out. The Crier tried in vain to expel the aggrieved litigant, but when the latter turned to resist, invariably fled from him. The result was a sensation and a messenger sent for the sanitary police, but before their arrival the carrier of contagion had disappeared. The windows were opened and the distribution of justice was resumed with a sense of relief.

THE London correspondent of the New York *Tribune* says of the new law peers:—"Sir Robert Collier and Sir Arthur Hobhouse are made peers in order to strengthen the legal side of the House of Lords. The former was Solicitor General in the Alabama-Alexandra days, and proved his soundness as a lawyer by the views he took of the obligations of the British Government in respect of stopping the rebel corsairs and rams. He became Attorney General in Mr. Gladstone's administration of 1868: three years later followed his appointment to the Judicial Committee of the Privy Council, a place worth \$25,000 a year. This he still retains. The controversy over that appointment is not forgotten, though it turned wholly on technical points. Sir Robert is a lawyer of learning and ability, with a passion for landscape painting, and an exhibitor in the Royal Academy. Sir Arthur Hobhouse is a public-spirited Englishman who has long served his country in various high capacities, as Charity Commissioner, as legal member of the Indian Council, and finally as member of the Judicial Committee of the Privy Council—all without pay. Few men have done more or better work; and not a shilling of public money has ever gone into his pocket. His is one of those cases which might make the sourest socialist meditate on the incidental advantage to the public of allowing men to possess private fortunes. Such honor as he now receives comes to him in a shape which still brings no pay and augments the expenses of life."

A NEW CLASS OF ALIENS.—At Chelsea, on September 25, before Mr. O. J. Williamson (revising barrister), Major Gray brought forward the case of a claimant who was born of Portuguese parents at Calcutta. He submitted that the claimant was a British subject by reason of his having been born within the dominion of the Crown. The claimant had always considered himself a British subject. The revising barrister said that British India was no part of the British Crown when the claimant was born there. Major Gray remarked that the Act taking over the country would make the claimant a British subject. The revising barrister said the Act was not retrospective. A man born at Calcutta was the subject of the Empress of India. An Englishman of the United Kingdom was a subject of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland. The laws of England prevailed in England only. The revising barrister held that the fact of a man being born in Calcutta did not make him a natural-born British subject, and that it was necessary to take out letters of naturalization for the purposes of being enfranchised. The claim must, therefore, be disallowed.—*Law Journal.*

The Legal News.

VOL. VIII. OCTOBER 31, 1885. No. 44.

A decision suited to the times was given by the Supreme Court of Iowa, June 2, 1885, in *Gilbert v. Hoffman*, 23 N.W. Rep. 632. The Court held that a hotel-keeper who with the knowledge of the prevalence of small-pox in his hotel keeps it open for business, and permits a person to become a guest, without informing him of the disease, will be liable for the communication of the disease to the guest, and the guest will not be precluded from recovering on the ground of contributory negligence in not making inquiries as to the truth of a rumour that there was small-pox in the house. The Court said: "Counsel for appellants contend that this evidence did not warrant the jury in finding for plaintiff, because (1) it does not show that defendants were guilty of such negligence as renders them liable; and (2) that plaintiff, by going to the house after she was informed of the rumor which was current as to the presence of the disease, and without instituting an inquiry as to its truth, was guilty of such contributory negligence as precludes a recovery. But this position cannot be maintained. The jury, as we have seen, were warranted by the evidence in finding that defendants, with knowledge of the prevalence of the disease in the hotel, kept it open for business, and permitted plaintiff to become a guest without informing her of the presence of the disease. That they would be liable to one who became their guest under these circumstances and contracted the disease while in their house, and who was himself guilty of no negligence contributing to the injury, there can be no doubt. The district court probably left it to the jury to determine whether plaintiff was guilty of imprudence or negligence in going to the hotel after she heard the rumor that the disease was in the house, without inquiring further as to its truth; and they were told that if the circum-

stances were such as that ordinary prudence and care demanded that she should, before going to the hotel, make further inquiry as to the truth of the rumor, and she neglected to do this, and this neglect contributed to the injury, she could not recover. The instruction states the rule on the subject quite as favorably to the defendants as they had the right to demand. By keeping their hotel open for business they in effect represented to all travellers that it was a reasonably safe place at which to stop; and they are hardly in a position now to insist that one who accepted and acted on this representation, and was injured because of its untruth, shall be precluded from recovering against them for the injury, on the ground that she might by further inquiry have learned of its falsity."

A correspondent referred some time ago to the hardship of a case in which a defendant had paid the debt to plaintiff's solicitor, and found that the discharge granted by the latter was not valid. The following note from an English journal shows how solicitors in default are treated in England:—

Before Mr. Justice A. L. Smith, sitting as vacation judge, on the 26th August, Mr. Scarlett moved for the release of a solicitor from Holloway gaol, where he was ordered to be imprisoned on August 10, 1884, for default in obeying an order of Mr. Justice Chitty, made on June 20, 1884. The solicitor in question had acted for a woman in an action for compensation for injuries brought against a tramcar company. A verdict was obtained for £250 damages, part of which the solicitor received under an agreement made with the woman. She subsequently brought her action against the solicitor to recover the money so paid, and the solicitor admitted that the agreement was illegal, and consented to judgment. On June 20, 1884, Mr. Justice Chitty ordered the solicitor to pay £100 into Court, £25 every fortnight, and on August 10, 1884, he made an order for a writ of attachment in default of payment. On August 5, 1885, the solicitor was arrested on his return from Reading, where he had been as witness in a trial. He had been in prison twenty days, and was absolutely without means, and by his imprisonment was deprived of earning the money he was ordered to pay. He submitted that, under the circumstances, the solicitor should be released.—Mr. Dale Hart, for the plaintiff, said that not one of the instalments had been paid.—Mr. Justice A. L. Smith said that the solicitor had been in prison for twenty days—was that enough for what the solicitor had done? In his lordship's opinion it was not, a month would be the proper period. He should order the solicitor to be released on September 5 next.

PATERNITY AND LIKENESS.

In a recent case of *Descheneaux & Lizotte*, before the Court of Appeal at Montreal, in which it was sought to establish that the appellant was the father of a child, one of the points urged in support of the alleged paternity was a pretended resemblance. The Court attached very slight importance to this point. A similar ground was urged in a case of *Hanawalt v. State* (24 N. W. Rep. 489), decided by the Wisconsin Supreme Court, on the 22nd of September last, in which the Court, after reviewing the authorities, came to the conclusion that "in bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing, by its likeness to defendant, that it is his child. The Court said: "Upon the question of the propriety of exhibiting the child to the jury as evidence in cases involving its paternity, the decisions of the courts are not in harmony. In North Carolina the Supreme Court of that State held that such exhibitions may properly be made. See *State v. Woodruff*, 67 N. C. 89. The same was held by the Supreme Court of Iowa in *State v. Smith*, 54 Iowa, 104; S. C. 37 Am. Rep. 192. In this last case the child was over two years old; but in the case of *State v. Danforth*, 48 Iowa, 43; S. C., 30 Am. Rep. 387, the same court held it was improper to exhibit to the jury a child only three months old. In *Eddy v. Gray*, 4 Allen, 435; *Jones v. Jones*, 45 Md. 144; *Keniston v. Rowe*, 16 Me. 38, the court held that testimony of witnesses that the child looks like or resembles in appearance the person charged to be the father is not admissible, and in *Reitz v. State*, 33 Ind. 187, and *Risk v. State*, 19 id, 152, it was held error to allow the prosecution to give the child in evidence so that the jury might compare it with the defendant who was present in court. In the *Douglas* case Lord Mansfield is reported as saying: 'I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discri-

minancy of voice, a difference in the gestures, the smile, and various other things, whereas a family likeness runs generally through all these, for in everything there is a resemblance, as of features, size, attitude and action.' See *Wills on Circumstantial Evidence*, p. 123. This author, on the next page, says that in a Scotch case, when the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant as being too much a matter of fancy and of opinion to form a material article of evidence. In the case of *Jones v. Jones*, *supra*, the learned judge who wrote the opinion refers to the language used by Lord Mansfield in the *Douglas* case, and disapproves of it as authority, and thinks it has not been followed as a precedent in the English courts, and he quotes with approval the language of Justice Heath in the case of *Day v. Day*, decided in 1797, in which the learned judge stated to the jury 'that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence.' The learned judge, in the case of *Jones v. Jones*, *supra*, in disapproving of the language used by Lord Mansfield, says: 'We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another with equal knowledge of the parties between whom the resemblance is supposed to exist.' It should be remembered that in the *Douglas* case, and the Maryland case, the question of parentage was as to a person who was full grown. So that if there is anything certain in family likeness it would be fully developed, and if in any case such claimed likeness could be considered by a jury in determining the question of parentage, it would be in a case of that kind. In the case of *Jones v. Jones* the court seemed to be of the opinion that 'when the parties are before the jury, and they can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered.' In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal opportunities of observa-

tion, will arrive at different conclusions, even in the case of mature persons, where a family likeness will be fully developed if there is any. And when applied to the immature child, its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain and fanciful a nature to be submitted to the consideration of a jury. The learned author of Beck's Medical Jurisprudence says: 'It has been suggested that the resemblance of a child to the supposed father might aid in deciding doubtful cases. This, however, is a very uncertain source of reliance. We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we should act unwisely in relying too much on them. There is, however, a circumstance connected with this, which when present, should certainly defeat the presumption that the husband or paramour is the father of the child, and that is when the appearance of the child evidently proves that its father must have been of a different race from the husband or paramour, as when a mulatto is born of a white woman whose husband is also white, or of a black woman whose husband is also a negro.' In a case where the question of race is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of the alleged father. *Warlick v. White*, 76 N. C. 175. In a case like the one at the bar, we think no exhibition should be made."

SUPERIOR COURT—MONTREAL*

Municipal taxes—Special assessment—Exemption—Educational Institution.

HELD:—That the exemption from municipal taxes enjoyed by educational institutions extends also to taxes imposed for special purposes such as the construction of a drain. —*City of Montreal v. Ecclesiastics of Seminary of St. Sulpice*, Torrance, J., June 30, 1885.

* To appear in full in Montreal Law Reports, 1 S.C.

Parol evidence—Tender of rent—C.C. 1233.

HELD:—That a tender of rent, not being a commercial matter, cannot be proved by parol evidence.—*Macfarlane v. McIntosh*, Torrance, J., June 2, 1885.

Coût des exhibits—Conclusion aux dépens.

JUGÉ:—1o. Que le coût des pièces n'entre en taxe contre la partie condamnée aux dépens, que lorsqu'elles étaient nécessaires à la cause, et, en outre, que lorsque la partie qui les a produites n'était pas présumée les avoir en sa possession.

2o. Que pour en obtenir la taxation, il n'est pas nécessaire d'en avoir demandé le coût spécialement, la conclusion générale aux dépens étant suffisante.—*Mainville v. Legault*, Jetté, J., 3 juillet 1885.

Plaidoirie—Litispendance—Compensation—Réponse en droit.

HELD:—That the irregularity of pleading compensation and litispence in the same plea, should not be attacked by an answer-in-law.—*Picard v. Bérard*, Torrance, J., 22 juin 1885.

Société en commandite—Responsabilité des associés—Mise sociale—Créanciers—Endossement—Paiement—Administration—Gérant.

JUGÉ:—1o. Qu'un associé commanditaire peut être poursuivi par les créanciers de la société en recouvrement de leur créance contre la société, jusqu'à concurrence de la partie de sa mise sociale non encore payée au temps de l'action.

2o. Que l'endossement des billets d'une société en commandite par un des associés ne peut être considéré comme un paiement de sa mise sociale, et ne peut que donner à cet associé, dans le cas où il serait appelé à payer ces billets, une créance ordinaire en sa faveur contre la société.

3o. Qu'un associé commanditaire qui s'immisce dans l'administration de la société et qui y fait des actes importantes de gestion encourt la responsabilité d'un associé en nom collectif.

4o. Que le gérant d'une société en commandite a l'administration entière de la société, et est le juge des besoins de l'établissement de la société; il peut donc, dans le cas

d'une manufacture, acheter ailleurs des objets semblables à ceux qui sont manufacturés par la dite société sans par là outrepasser ses pouvoirs. — *Williams v. Beauchemin et al.*, Chagnon, J., 10 juin 1885.

Action qui tam—Connexité—Réunion de causes.

Jugé :—Qu'il y a connexité entre plusieurs actions qui tam prises pour des offenses différentes sous l'Acte Electoral, mais pendant la même élection, et que pour cette raison les actions peuvent être réunies par ordre de la Cour pour n'en former qu'une seule. — *Larivière v. Choquet*, Loranger, J., 5 déc. 1882.

Reddition de compte—Contestation—Détails—Admission.

Jugé :—Que lorsqu'un procureur ou un exécuteur testamentaire rend compte en justice, et que dans les dépenses d'administration, il charge divers montants pour réparations aux immeubles administrés, l'oyant compte ne peut dans ses débats de compte n'admettre de ces dites dépenses qu'une somme en bloc, moindre que celle réclamée, mais qu'il devra déclarer quels items il admet, et quels items il conteste. — *Mayer et al. v. Léveillé*, Torrance, J., 22 juin 1885.

Défense en droit à une défense en droit.

Jugé :—Qu'une défense en droit doit être jugée sur son propre mérite en droit, et qu'il ne peut y avoir de défense en droit à une autre défense en droit. — *La Compagnie de Prêt et Crédit Foncier v. Lemire*, et *Gérard*, en rep. d'instance, Torrance, J., 15 juin 1885.

Amendement—Droit de la partie adverse—Jugement final—Révision.

Jugé :—Que lorsqu'un tribunal accorde une demande d'amendement important, il doit toujours donner à l'autre partie la faculté d'y répondre, et dans le cas où un amendement n'est permis que par le jugement final, ce jugement pour la raison susdite est erroné et peut être cassé en révision. — *Pauzé ex qu'il. v. Senécal*, En Révision, Sicotte, Mathieu, Loranger, JJ., 31 mars 1884.

Règlement de la Cité de Montréal—Enlèvement de la neige ou glace—Poursuite—Propriétaire—Occupant—Lot vacant.

Jugé :—Que d'après la loi et les règlements

de la cité de Montréal, un propriétaire ne peut être poursuivi pour ne pas avoir enlevé la neige ou la glace des trottoirs situés en face d'une maison, d'une bâtisse ou d'un lot lui appartenant, que lorsque ce propriétaire occupe lui-même cette maison ou bâtisse, ou lorsqu'il s'agit d'un lot vacant. — *La Cité de Montréal v. Beaudry et al.*, Taschereau, J., 1 décembre 1882.

Arrestation illégale—Action en dommages—Défense—Faits postérieurs—Contrainte par corps—Frais.

Jugé :—1o. Que dans une action en dommages pour arrestation illégale, le défendeur ayant fait arrêter le demandeur et ayant ensuite discontinué sa poursuite, le défendeur ne peut plaider, pour justifier cette arrestation, d'autres faits que ceux dont il s'est plaint dans la dénonciation.

2o. Que dans une action en dommages de cette nature, le défendeur ne peut demander la contrainte par corps contre le demandeur, pour le paiement de ses frais, dans le cas où l'action serait déboutée. — *Bogue v. Brouillet*, Torrance, J., 3 juin 1885.

Married Woman—Donation—Action by husband.

HELD :—That the condition annexed to a bequest of money to a married woman, that it shall not be subject to the control of her husband, and shall be for aliment, and not subject to seizure, is valid, and an action by the husband in respect of such money will not be maintained. — *Minto v. Foster et al.*, Torrance, J., June 17, 1885.

CIRCUIT COURT.

MONTREAL, Sept. 14, 1885.

Before LORANGER, J.

WADE et al. v. CANADIAN PACIFIC RAILWAY COMPANY.

Railway—Bill of Lading—Responsibility of Carrier.

The plaintiffs sued for \$67.70, value of eight barrels of flour, short delivered at Montreal.

At the trial the proof established that in June, 1881, the Missouri Pacific Railway

Company signed a bill of lading to forward and deliver one hundred and fifty barrels of flour, consigned to plaintiffs at Montreal; a way bill was made out, and the car sealed, and handed to a Company known as the Red Line Transportation Company, by whom the car was delivered at Brockville to defendants. The defendants received the sealed car at Brockville and conveyed it to Montreal, there notifying the plaintiffs by usual advice note of its arrival, and as containing one hundred and fifty barrels of flour, consigned to their order; the information contained in the advice note having been obtained from the way bill before the car was opened. On opening the car only 142 barrels were found, which were duly delivered to the plaintiffs, who subsequently sued in re-vendication for the balance of eight barrels, alleging a contract at St. Louis and setting up the bill of lading and advice note.

The defendants pleaded that they were not parties to the bill of lading; that they only received the car at Brockville, it being then sealed, and that they conveyed it to Montreal, with the seals intact, and in the same condition as when received, and that the advice note was merely a notice sent by custom of trade, contents of which were taken from the way bill, and could not amount to a binding admission.

The Court held that the defendants not being parties to the original bill of lading were not bound by it; but that they had fulfilled all their obligations by delivering the contents of the sealed car. That plaintiffs had not shown, as they were bound to do, that the car contained 150 barrels at St. Louis or at Brockville, the advice note not being such an admission as would relieve them from so doing, or estop the defendants from making proof to the contrary if necessary.

Macmaster, Hutchinson & Weir, Attorneys for Plaintiff.

C. S. Campbell, Attorney for Defendants.

COUR D'APPEL DE PARIS (FRANCE).

9 juillet 1885.

M. PÉRIVIER, Président.

BARRANDE et BARRANDE.

Possession d'état — Contestation — Reconnaissance — Enfant naturel — C.C., article 231.

Juge : — Que l'article 231 du Code Civil qui met

à l'abri de toute contestation d'état celui qui a une possession conforme à son acte de naissance, ne peut être invoqué par les enfants naturels. Qu'en conséquence, la possession d'enfant naturel, jointe à une reconnaissance, ne constitue qu'une présomption dont les tribunaux peuvent tenir compte pour écarter ou admettre la contestation des intéressés.

Le 23 Janvier 1884, le tribunal civil de Meaux a rendu le jugement suivant, qui explique suffisamment les faits de la cause :

“ Attendu que le sieur Jules Calixte Barrande, en son vivant manufacturier à Lagny, est décédé à Cernay-les Reims (Marne) où il se trouvait momentanément le 12 avril 1882, laissant :

“ La dame Octavie-Elisa-Héloïse Hortet, sa veuve survivante :

“ Premièrement, comme commune en biens aux termes de leur contrat de mariage reçu par Me. Breuillaud, notaire à Paris, le 22 novembre 1869 ;

“ Deuxièmement, et comme légataire universelle de toute la quotité disponible de la succession du dit sieur Barrande, son défunt mari, aux termes du testament olographe de celui-ci, en date à Cernay-les-Reims du 9 avril 1882, enregistré et déposé en l'étude dudit M. Breuillaud le 21 avril suivant ;

“ Et pour héritiers, dans des proportions différentes : 1° François-Emile Barrande, son fils majeur, enfant naturel reconnu ; 2° Jules-Octave Barrande, son fils mineur, enfant reconnu et légitimé par l'acte de célébration du mariage des sieur et dame Barrande-Hortet ;

“ Attendu qu'après ce décès il a été procédé à un inventaire par Me. Breuillaud, notaire susnommé, en date au commencement du 2 juin 1882 ;

“ Attendu que le mineur Jules-Octave Barrande est lui-même décédé sans postérité à Lagny, le 27 novembre 1882, saisi pour partie de la succession du sieur Jules Calixte Barrande, son père, et laissant pour héritiers chacun pour partie : Premièrement, la dame veuve Barrande-Hortet pour moitié ; Deuxièmement, le sieur Jean-Baptiste Barrande père, son grand-père paternel, pour un quart à réserve ; Troisièmement, Thérèse-Victorine-Félicité Claret, épouse dudit Jean-Baptiste

Barrande, sa grand-mère paternelle, pour le dernier quart aussi à réserve ;

" Attendu qu'une demande en liquidation a été formée par la veuve de Jules-Calixte Barrande ;

" Attendu qu'il n'a point encore été procédé aux opérations de compte, liquidation et partage des dites communauté et succession ci-dessus indiquées ;

" Attendu qu'aux termes de l'art. 815 C. Civ., nul n'est tenu de demeurer dans l'indivision ;

" Mais attendu que les époux Jean-Baptiste Barrande contestent à François-Emile Barrande l'état d'enfant naturel reconnu par Calixte Barrande ; et qu'ils articulent certains faits à l'appui de leurs prétentions ;

" Attendu toutefois que François-Emile Barrande prétend non-seulement qu'il a une possession d'état conforme à son acte de reconnaissance, mais qu'il soutient en outre que Jean-Baptiste Barrande, demandeur, s'est lui-même rendu non recevable à contester ledit état, et qu'enfin l'articulation de faits n'est ni pertinente ni admissible ; que, de son côté, la dame veuve Barrande proteste contre cette contestation d'état :

.... (Sans intérêt.)

" Statuant :

" Premièrement, en ce qui concerne la contestation d'état :

" Attendu d'un côté que si l'art. 322 du C. civ. dit : ' nul ne peut contester l'état de celui qui a une possession conforme à son titre de naissance,' ces termes ne s'appliquent qu'à la filiation légitime ;

" Attendu, d'un autre côté, que, l'art. 339 du même Code admettant, en matière de filiation naturelle, la contestation de la part de toutes les personnes intéressées, cette règle doit servir de base aux tribunaux ;

" Attendu, en conséquence, que la possession d'état d'enfant naturel concourant avec une reconnaissance faite à une date plus ou moins postérieure à la naissance, n'est en somme qu'une présomption dont le juge peut tenir compte dans une certaine mesure pour écarter certaines articulations de fait :

" Mais attendu, dans l'espèce, que cette présomption est en grande partie infirmée par cette circonstance que Calixte Barrande, en contractant, le 22 novembre 1869, mariage

avec la demoiselle Hortet n'a pas légitimé François-Emile né en 1859, tandis qu'au contraire il a légitimé Jules-Octave, né à Paris le 3 décembre 1866 ; qu'enfin, concurremment avec sa femme il n'a reconnu François-Emile qu'à la date du 24 octobre 1876 ;

" Attendu, au point de vue de savoir si, par des actes d'adhésion plus ou moins tacites Jean-Baptiste Barrande ne s'est point rendu non recevable à contester la filiation paternelle de François-Emile Barrande, qu'il y a lieu de décider que les correspondances émanées de François-Emile, de Calixte Barrande ou de personnes de la famille autres que les époux Jean-Baptiste Barrande, que les lettres de faire part du décès de Calixte Barrande, lettres dans lesquelles François-Emile Barrande figure à côté de Jean-Baptiste Barrande, et qu'enfin l'intitulé de la délibération du conseil de famille du mineur Jules-Octave Barrande, intitulé dans lequel Jean-Baptiste Barrande figure à côté de François-Emile Barrande, qualifié fils de Calixte Barrande, ne suffisent pas pour faire déclarer Jean-Baptiste Barrande non recevable en son action ;

" Attendu qu'il n'y a pas lieu non plus de s'arrêter à l'argument d'après lequel les époux Jean-Baptiste Barrande, étant aux droits du mineur Jules-Octave Barrande, décédé le 27 novembre 1882 et ledit mineur n'ayant pas, lors de l'inventaire des 2 juin et 12 juillet 1882 et par l'organe d'Hugo son subrogé tuteur, contesté la filiation de François-Emile Barrande, lesdits époux Jean-Baptiste Barrande ne le pourraient plus aujourd'hui ; qu'en effet, le droit de contester est attaché à la personne ; mais que toutefois la personne ne doit l'exercer que quand elle a un intérêt né, résultant soit de la transmission des biens, soit même de toute considération morale dont les tribunaux sont les arbitres souverains ; qu'au surplus l'action en contestation d'état, étant d'ordre public, est imprescriptible ;

" Attendu toutefois que certaines des articulations des époux Jean Barrande doivent être écartées ;

" Mais attendu que pour le surplus ces articulations doivent être déclarées pertinentes et admissibles et qu'il y a lieu de les admettre ;

Deuxièmement....(sans intérêt.)

" Par ces motifs,

" Donne acte aux époux Jean-Baptiste Barrande des diverses réserves par eux ci-dessus faites, pour lesdites réserves être ramenées à effet au cours de la liquidation ainsi qu'il appartiendra ;

" Donne acte à la veuve Calixte Barrande de ce qu'elle proteste formellement contre toutes les réserves faites par les époux Jean-Baptiste Barrande, et de ce qu'elle maintient ses droits pour les faire valoir au cas où lesdites réserves seraient ramenées à effet ;

" Donne acte aux époux Jean-Baptiste Barrande, de ce qu'ils ont modifié leurs conclusions sur la question de licitation de l'immeuble sis à Lagny, rue du Prélong, 5 ; leur donne acte de ce qu'ils déclarent s'en rapporter à la justice sur la demande en liquidation et partage des communauté et successions dont s'agit ;

" Donne acte à François-Emile Barrande, de ce qu'il s'en rapporte à justice en ce qui touche la demande en compte, liquidation et partage, et les diverses questions accessoires soulevées soit par la dame veuve Barrande, soit par les époux Jean-Baptiste Barrande ;

" Et attendu que certains des faits articulés par les époux Jean-Baptiste Barrande sont pertinents, admissibles et que la preuve peut en être autorisée ;

" Admet lesdits époux Jean-Baptiste Barrande à prouver tant par titres que par témoins : 1° Que François-Emile Hortet (aujourd'hui François-Emile Barrande), est né à Reims le 15 août 1859 ; que la demoiselle Hortet avait alors seize ans ; qu'elle n'était jamais venue à Paris, et qu'elle n'avait jamais quitté la maison de son père, Pierre Hortet, médecin à Reims ; 2° Que le sieur Calixte Barrande, en 1859, avait vingt et un ans ; qu'il demeurerait à Paris chez ses parents et qu'il n'avait jamais été à Reims ; 3° Que la demoiselle Hortet est venue à Paris longtemps après ses couches ; qu'elle est entrée au magasin du *square Cluny* et qu'en 1865 elle est venue habiter dans la maison située au numéro 4 du boulevard Sébastopol ; que le sieur Calixte Barrande demeurerait alors dans cette maison) que c'est là qu'il fit connaissance avec la demoiselle Hortet qui accoucha de son *second fils*, aujourd'hui décédé, le 3 décembre

1866 ; 4° Que François-Emile Hortet a été mis en pension, à Neuilly, par sa mère elle-même sous le nom de Emile Millet ; 5° Que lors de l'invasion allemande, François-Emile Hortet avait onze ans ; les époux Calixte Barrande, en quittant Lagny, l'y ont laissé sous la garde d'un tiers, tandis qu'ils emmenaient avec eux l'autre enfant de la dame Barrande, aujourd'hui décédé ; 6° Qu'il était de notoriété publique que Calixte Barrande n'était pas le père de François-Emile Hortet, et que, soit avant, soit après la reconnaissance du 24 octobre 1872, Calixte Barrande le disait lui-même à toutes les personnes avec lesquelles il était en relations ;

" Rejette le surplus des articulations ;

" Dit que l'enquête aura lieu devant M. Droz, et à son défaut, devant M. Roger de Villers, tous deux juges en ce siège ;

" Dit et ordonne que préalablement aux opérations, etc."

* * * * *

(Le surplus sans intérêt.)

Appel par M. François-Emile Barrande et Mme. veuve Calixte Barrande. Arrêt :

LA COUR,

Considérant que les critiques portées devant la Cour par les appels concernent les dispositions dudit jugement relatives : 1° à la contestation d'état de François-Emile Barrande ; 2° à l'estimation du fonds de commerce dépendant de la communauté d'entre les époux Calixte Barrande ; 3° à l'époque à laquelle doit être établie la situation active et passive ; 4° au bail que la veuve Barrande revendique à son profit de la propriété sise à Lagny, quai du Prè-Long, n° 5 ; et 5° enfin, au partage, en nature ou licitation dudit immeuble ;

En ce qui touche la contestation d'état :

Adoptant les motifs invoqués par les premiers juges ;

En ce qui concerne l'estimation faite à l'inventaire du 2 juin 1882 :

Confirme, etc.

(Le surplus sans intérêt.)

Note du rapporteur, M^{re}. Manuel.—L'article 322, peut-il être invoqué par les enfants naturels ?

En doctrine, l'affirmative a eu un moment ses partisans ; plusieurs auteurs l'ont soutenue en se fondant sur la généralité des termes

de l'article 322, qui ne distingue pas entre la filiation naturelle et la filiation légitime. V. notamment Toullier, II n° 899; Merlin, Répertoire, v° Légitimité, section II, n° 4; Proudhon II, p. 153; Loiseau, Enfants naturels, 41,528.

Mais aujourd'hui, l'unanimité des auteurs enseigne que l'art. 322 ne s'applique qu'à la filiation légitime. V. Laurent, IV, n° 18; Demolombe, V, n° 481; Zachariæ, III, p. 665, note 13; Duranton, V, n° 133; Aubry et Rau, VI, section 546, note 22.

Quant à la jurisprudence, elle est également unanime, ou à peu près, dans le sens de la négative. V. Bordeaux, 12 février 1838 (D.38.2.340); Cass. 13 février 1839 et 22 janvier 1840 (D.40.1.39 et 50); Cass. 22 février 1843 (D.43.1.127); Bordeaux, 10 avril 1843 (D.43.2.152); Cass. 10 février 1847 (D.47.1.49); Bordeaux, 25 mai 1848 (D.48.2.170); Douai, 6 juin 1851 (D.52.2.221); Cass. 12 février 1868, et sur renvoi, Grenoble, 24 juin 1869 (D.68.160 et 69.2.207); Cass. 9 juillet 1879 (J. du P. 80.577 et la note de M. Labbé).

Laurent (*loco citato*) indique, comme contraire à cette jurisprudence quasi-unanime, un arrêt de la Cour de Paris du 10 mai 1851; cette indication est sans doute une inadvertance de l'éminent jurisconsulte, car cet arrêt ne traite pas la question dont il s'agit D.53.2.115). Il existe dans le même sens un arrêt d'Aix, du 30 mai 1866; mais il a été cassé par la Cour suprême le 12 février 1868 (V. ci-dessus). On cite, encore, à l'appui de la minorité des auteurs, deux arrêts d'appel, l'un de Rouen 19 décembre 1844 (D.45.2.97), et l'autre de Paris du 26 juillet 1849 (D.49.2.220); mais ils n'ont pas trait à la question qui nous occupe. On peut donc considérer le principe proclamé par la Cour de Paris comme désormais indiscutable.

GENERAL NOTES.

Some difficulty was experienced at the Regina trials in making the Indian prisoners understand the legal terms in which their offences were set forth. The interpreter, according to the correspondent of a western paper, had a very imperfect knowledge of English, and some of his attempts to translate words in the indictment were ludicrous in the extreme. For instance, no term could be found to convey to the untutored mind the idea of the Queen's crown, which he was charged with conspiring against. This was explained to One Arrow as being "the Great Mother's big war bonnet with feathers in it."

General Booth's followers appear to have invented yet another mode of tormenting the long-suffering British householder. This consists in kneeling down upon the persecuted one's doorstep and vociferously praying for the salvation of his soul. Such a proceeding is surely aggravating enough to provoke the proverbial saint, but the subject of the prayers must not think he has a right to take the law into his own hands, however just his indignation may appear. In a Durham village last week a Salvationist knelt on an old woman's doorstep, and prayed loudly for her soul. The old woman retorted by pouring over him a bucket of water, but the Salvationist summoned her for assault, and the lady was fined half-a-crown. If praying on other people's doorsteps be legal, a new terror has most decidedly been added to existence.—*London Truth*.

SENSATIONAL CHANCERY SUIT.—An interesting case will shortly engage the Court of Chancery. Sir C. S. G. Ward claims, by right of descent, the Bixley Hall estates, in Norfolk, said to be worth nearly half a million sterling. The Court of Chancery has long held possession of the estates and collected the rents, but the hall and park, which is of considerable extent, are practically in the possession of Sir Charles, though nominally held by the Court. The baronet has locked up the park gates, turned the tenants out of the hall, and cut down timber in the park, without meeting with any opposition. Messrs. Cox & Co., 41 Southampton Buildings, Holborn, London, are engaged in collecting information from the Chancery Records and elsewhere, and nothing is wanting to complete the case but one important document. This document is said to have been placed in a coffin by the late Lord Ward, and deposited in the family vault at Bixley. Application was made to the Home Secretary in the late Administration for permission to open the coffin; but owing to the immediate change of Government the matter dropped for the time. Sir C. S. G. Ward also claims the title of Lord Ward.—*Law Journal* (London).

We confess to a considerable amount of sympathy with the robust aversion, which Mr. Justice Day is in the habit of expressing, to the modern pleader's delicacy about alleging fraud. There can be no doubt that this reluctance to call a spade a spade has been the cause of a great deal of bad law, though it must also be admitted that the squeamishness of certain judges has contributed not a little to the result. Last week Mr. Justice Day had before him a case where a shareholder had taken shares in a company on the faith of a statement in the prospectus that the company had concluded various contracts for the sale of many thousands of the machines in which they dealt. The "contracts" were in fact mere undertakings to take a specified number of machines at such time and in such quantities as the purchasers might choose, and, as might have been expected, not a single machine had ever been sold under any one of them. "Surely," said the learned judge rather impartially at an early stage in the case, "the issue here is, fraud or no fraud." So we should have thought. A pleader in Lincoln's Inn, however, had not ventured to suggest anything stronger than "misrepresentation," while at the trial, until the judge's protest, nothing had even been heard of but "unilateral mistake." If the word fraud were used a little more boldly there might be a good deal less occasion for the use of it.—*Law Times*, London.

The Legal News.

VOL. VIII. NOVEMBER 7, 1885. No. 45.

The decision of Mr. Justice Taschereau in the case of *La Municipalité du Village du Mile End v. La Cité de Montréal*, noted on p. 337, was unanimously affirmed on the 4th instant in Review, by Justices Torrance, Mathieu and Mousseau.

The Duke of Marlborough has written a letter to the *Times*, abusing the system of land transfer in England, and abusing still more the lawyers, on whom he places the responsibility of existing evils. The letter shows that a Duke does not figure in a less ridiculous light than other people when he ventures upon unknown ground. It may be remarked that a series of letters upon the same subject has been addressed to the *Times* by Mr. Horace Davey, and in these letters that eminent counsel advocates a reform of the land laws which would introduce a system of registration very much like that which has for some years existed in the Province of Quebec. Mr. Davey proposes the adoption of the numbering on the tithe maps. The *Law Journal* prefers the six-inch Ordinance Survey Map, which it says is an accurate production, and quite large enough for rural districts.

A person who hissed a singer in a theatre at Lyons, France, was arrested recently, but on appeal he was discharged, the Court holding that he had as much right to express his disapprobation of a performance as others had to express their approval. So, too, it has been held by the Courts in England. In *Clifford v. Brandon*, 2 Camp. 358, Lord Mansfield observed:—"The audience have certainly a right to express, by applause or hisses, the sensations which naturally present themselves at the moment, and nobody has ever hindered or would ever question the exercise of that right." It is otherwise where a conspiracy exists to hiss an actor. In *Gregory v. Brunswick*, 1 C. & K. 24, Tindal,

C.J., observed:—"There is no doubt that the public who go to a theatre have the right to express their free and unbiassed opinion of the merits of the performers who appear upon the stage. At the same time parties have no right to go to a theatre by a preconcerted plan to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage by such a scheme probably concocted for an unworthy purpose."

Some landlords will, no doubt, suffer considerably from the epidemic in connection with a certain class of property. And besides loss of rent, the most desirable tenants will next spring not be anxious to go into premises where a loathsome disease has prevailed, whatever the efficacy of the disinfecting process may be. It may be well if their own interest prompts landlords to refuse to lease their property in future to any family which cannot produce a certificate of vaccination. This would go a long way to nullify the pernicious teachings of the anti-vaccinationists, whose fatal influence in Montreal has destroyed three thousand lives, chiefly of innocent and irresponsible children, and cost the citizens many millions of dollars.

COURT OF QUEEN'S BENCH— MONTREAL.*

Motion to quash appeal—Acquiescence—Art. 1130 C. C. P.—Effect of acquiescence of one defendant on his co-defendant.

HELD :—1. That a letter written by one of the defendants in an hypothecary action to the plaintiff's attorneys after the rendering of the judgment, which condemned them as joint undivided owners of an immoveable to abandon it or pay the plaintiff's claim, and before the institution of the appeal, asking for delay until said defendant could get his *garans* to pay the claim, and promising to settle with the plaintiff if the *garans* did not, constituted an acquiescence in the judgment *a quo* on the part of said defendant, and that his appeal would be dismissed on motion.

*To appear in full in Montreal Law Reports, 1 Q.B.

2. That the other defendant was not bound by this acquiescence as it did not appear that any partnership existed between him and his co-defendant (beyond the joint ownership of the immoveable in question), or that he had authorized the writing of the said letter. —*Dickson et al. & Galt*, Dorion, C.J., Monk, Ramsay, Cross, JJ., Sept. 24, 1885.

Servitude de passage—Aggravation—Changement de destination—Art. 558 C. C.

Le propriétaire d'un fonds en culture en vendant deux lots détachés de ce fonds, avait établi une servitude de passage à pied et en voiture en faveur de ces lots sur une autre partie du dit fonds, avec stipulation portant que les barrières fussent tenues fermées. Sur l'un des lots ainsi cédés une raffinerie d'huile de charbon, et sur l'autre un abattoir, furent subséquemment érigés, et pour l'exploitation de ces deux industries les propriétaires des fonds dominants firent passer journellement un grand nombre de bestiaux et voitures par le dit passage, de telle sorte que les barrières étaient toujours ouvertes :—

Jugé :—(Ramsay and Cross, JJ., *diss.*)—Que dans les circonstances il y avait aggravation de la servitude aux termes de l'art. 558 C.C., et que le propriétaire du fonds servant était bien fondé à demander des dommages pour l'abus du droit de passage, et une défense pour l'avenir de s'en servir pour l'exploitation des dites industries. —*McMillan & Hedge*; et *Dominion Abattoir Co. & Hedge*, Dorion, J.C., Ramsay, Tessier, Cross, Baby, JJ., 20 mai 1885.

Privilege du constructeur—C.C. 2013.

Jugé :—1o. Qu'en vertu de l'art. 2013 du Code Civil, le constructeur qui a observé les formalités requises par cet article n'a de privilège que sur le plus-value donnée à l'héritage par les constructions qu'il y a faites, et qu'il n'a aucun privilège ou hypothèque sur le fonds même de l'héritage.

2o. Que l'enregistrement du procès-verbal par l'art. 2013 C.C. pour la préservation du dit privilège, ne crée pas sur l'immeuble une hypothèque tacite en faveur du constructeur. —*La Corp. du Séminaire de St-Hyacinthe d'Yamaska & La Banque de St-Hyacinthe*, Dorion, J.C., Ramsay, Cross, Baby, JJ. (Tessier, J. *diss.*), 25^e septembre 1885.

Expropriation—Riparian proprietor—River frontage—Valuation—Servitude.

HELD :—1. That a proprietor whose land extends to the beach of the River St. Lawrence, within the limits of the Harbour of Montreal, has not such a distinct and independent right of easement or servitude in the river frontage as is susceptible of being valued separately and apart from the compensation awarded for the property itself when the latter is expropriated for public purposes. The inconvenience of being excluded from easy access to the river is merely an element to be considered by the arbitrators when estimating the indemnity to be awarded for the property expropriated.

2. That even if the riparian proprietor expropriated possessed such easement or servitude, the functions of the arbitrators would not extend to the valuation of such right, unless it were included in the notice or demand of expropriation. —*Starnes & Molson*, Dorion, C.J., Monk, Tessier, Cross, Baby, JJ., May 26, 1885.

B.N.A. Act, sec. 91, no. 27; sec. 92, no. 8—Local Jurisdiction—Municipal Institutions—Nuisance—Chimney sending out smoke in hurtful quantity.

HELD :—That while the local legislatures have no jurisdiction to deal with an indictable misdemeanor, that being a matter of criminal law assigned exclusively to the Parliament of Canada,—they have authority to legislate for the prohibition of things hurtful to public health not matter for indictment at common law, such as factory chimneys "sending forth smoke in such quantity as "to be a nuisance." The local legislatures possess this power as coming under "municipal institutions," under B.N.A. Act, s. 92, no. 8; and the fact that a term of the criminal law ("nuisance") is used in a local Act to characterize an offence within the jurisdiction of the local legislature does not make the enactment *ultra vires* so long as the offence is not *per se* an indictable offence under the criminal law. —*Pillow & City of Montreal*, Dorion, J.C., Ramsay, Cross, Baby, JJ., Jan. 28, 1885.

Servitude—Destination by proprietor—Extent of servitude—C.C. 545. 551.

Held:—1. As regards servitudes, the destination made by the proprietor is equivalent to a title, only when it is in writing, and the nature, the extent and the situation of the servitude are specified. C.C. 551.

2. The use and extent of a servitude are determined according to the title which constitutes it; so, where E. acquired four houses "with the servitude of hidden drains underneath the yards," and it appeared that a drain had been constructed to conduct the sewage of the four houses in question as well as of the adjoining corner house, to the street drain, it was held that the deed did not give any right of servitude in the portion of the drain under the yard of the adjoining corner house, this not being mentioned in the deed, and not being included in the description given therein. — *Fisher & Evans, Dorion, C.J., Monk, Ramsay, Cross, Baby, J.J.*, September 25, 1885.

THE RIEL CASE.

A special sitting of the Judicial Committee of the Privy Council was held on the 21st of October to hear the argument on the petition for special leave to appeal from the decision of the Court of Queen's Bench for the Province of Manitoba, presented on behalf of Louis Riel, the leader of the late rebellion in Canada. Their Lordships present were the Lord Chancellor (Lord Halsbury), Lord Fitzgerald, Lord Monkswell, Lord Hobhouse, Lord Esher (the Master of the Rolls), and Sir Barnes Peacock.

The petitioner was represented by Mr. Bigham, Q.C., Mr. Jeune, and Mr. Fitzpatrick (of the Canadian Bar); the Attorney-General, Mr. R. S. Wright, and Mr. Danckwerts appeared for the Crown; and Mr. Burbridge, Q.C., the Canadian Deputy Minister of Justice, appeared for the Canadian Government.

It may be remarked that the petition came on to be heard on Tuesday, the 13th ult., but on the application of the petitioner's counsel, their Lordships consented to an adjournment till the 21st, the hearing of the petition to be then peremptorily proceeded with.

Mr. Bigham, Q.C., in opening the petition, stated that Louis Riel had been sentenced to death at Regina, in the Northwest Territories of Canada, and that sentence had been confirmed on appeal by the Court of Queen's Bench for the Province of Manitoba. The petition asked for leave to appeal against that decision, and the substantial ground on which the application was based was—that the stipendiary magistrate and the justice of the peace who condemned the prisoner to death had no jurisdiction to try the petitioner at the original trial. The petitioner had been tried for the crime of treason, and found guilty upon evidence which was not questioned in the court of first instance, and, therefore, it was to be assumed that, if the petitioner were responsible for his actions, as to which there appeared to be some doubt, he was guilty of the crime with which he was charged. The substantial defence in the court of first instance, and insisted upon in the Court of Queen's Bench, was that he was not responsible for his actions; but the Court of Queen's Bench, which undoubtedly had power to hear the appeal, came to the conclusion that the verdict on the question of sanity or insanity was abundantly supported by the evidence. The question which it was desired to have determined in solemn argument was, whether the court of first instance had jurisdiction to try the petitioner in the way they did; and to arrive at what their jurisdiction was, it was necessary to examine the legislation which had taken place on the subject. The learned counsel then proceeded to refer to the various acts of Parliament under which the legislative bodies, both of the Dominion and the various provinces of Canada, had been constituted. By the British North America Act of 1871 the Northwest Territories became a part of the Dominion of Canada, and, acting under the provisions of that statute, the Dominion Parliament had passed the Northwest Territories Act of 1880, under which Act the petitioner had been tried. The question for argument would be whether, under the words of section 4 of the British North America Act of 1871, which gave the Dominion Parliament power to legislate for the due administration and the peace, order and good government,

of Her Majesty's subjects in the Northwest Territories, the Dominion Parliament could pass such an act as the Northwest Territories Act of 1880, giving power to try for treason, and in various ways altering the statutory rights of a man put upon his trial for that crime. For instance, it provided that he should be tried before two magistrates—one a stipendiary magistrate and the other a justice of the peace—and a jury of six persons, instead of by a judge and a jury of twelve; and it also limited his right of challenging jurors to six instead of thirty-five, as under the Act of William III. The contention would be that it was not competent for the Dominion Parliament, under the words of the Act of 1871, to make a law which took away from a criminal charged with treason, which was a crime against the State, the right to be tried by a jury of twelve men, whose verdict must be unanimous. The Dominion Parliament was itself the creature of statute, and it could do nothing more than the Imperial Legislature had authorized it to do; and the question was whether an Act of Parliament, which took away the right of a man to be tried in the way in which the law of the land said he should be tried, was an Act of Parliament necessary to secure either the due administration, the peace, the order, or the good government of the Territory.

The Lord Chancellor said it might be passed for the purpose, although it might not serve its end. It was not every Act of Parliament that did serve its end.

Mr. Bigham said it might be a provision intended for the purpose.

The Lord Chancellor asked whether that was not really the meaning of the words—made for the due administration?

Lord Monkswell said that the words administration, peace, order and good government necessarily implied the enforcement of the criminal law.

Mr. Bigham said that Parliament did not purport to create any new offence, or to alter the definition of treason in any way. All that it purported to do was to provide a method by which a person charged with the crime could be tried; and a different method from that under which he was previously entitled

to be tried, limiting the safeguards and the rights which he previously had.

Sir Barnes Peacock enquired whether it was necessary for good government that persons should be tried for crimes and offences?

Mr. Bigham—Certainly; but is it necessary for good government that a man should be tried by six jurors instead of by twelve?

Lord Hobhouse said that might be very desirable in a thinly peopled country. It was the case in India, and the Legislature were to judge of that.

Lord Esher enquired whether the word provision in the section included a statute.

Mr. Bigham—Certainly.

Lord Esher—Then they might pass an act for the peace, order and good government of the province. How could those words be limited?

Mr. Bigham said he should contend that unless the statute passed under the powers of section 4 of the Act of 1871 was necessary, or at all events conducive to the purposes referred to in that section, it was *ultra vires*.

Lord Esher pointed out that the word "necessary" was not in the section nor anything equivalent to it. The argument came to this, that although the statute was made with the intent and for the purpose of peace, order, and good government, yet it was *ultra vires* if the Privy Council thought it was not necessary.

Mr. Bigham—Or did not serve the purpose.

Sir Barnes Peacock pointed out that the same words occurred in the Act relating to India under which the Penal Code and the Code of Criminal Procedure had been passed, and if they had the effect contended for no trial could take place in India. Every man who was convicted in India would have the same right to appeal from a sentence of death or transportation.

Mr. Bigham said he could only put the point as he understood it and as he believed it was put before the court below, that it could never have been intended that the Dominion Parliament should legislate with reference to a crime which affected the State in the way that treason did. The learned counsel then stated that he proposed to pass over the second and third points taken in the petition and deal with the fourth, which,

though technical, was one with which he ought to deal. It was that "The evidence at trial was not taken down by the stipendiary magistrate or by him caused to be taken down in writing as directed by the statute in that behalf." By sub-section 7 of section 76 of the Northwest Territories Act of 1880, it was provided that:—"The stipendiary magistrate shall on any such trial take or cause to be taken down in writing full notes of the evidence and other proceedings thereat." What had happened was that the magistrate had directed a shorthand writer to take a note of the evidence, and the question was whether a magistrate who had the proceedings taken down in that way could be said to have caused notes of the evidence and the other proceedings to have been taken in writing at all. They were taken down in a form which was not legible to any one but a particular person.

The Lord Chancellor inquired if it was meant that shorthand was not writing?

Mr. Bigham supposed that was meant to be the contention.

The Lord Chancellor said that "a shorthand writer" was a familiar phrase to most of their Lordships.

Mr. Bigham said he should contend that it was not writing within the meaning of the section.

The Lord Chancellor—Then if the judge took down notes and abbreviated any words, I suppose that would vitiate his notes altogether?

Mr. Bigham—I do not think so.

Lord Hobhouse said that the argument would include taking notes in longhand which was not legible to the learned judge himself, let alone other people.

Lord Esher thought that the section was merely directory.

Mr. Bigham pointed out that the object of the evidence being taken down was that it might be transmitted to the Minister of Justice together with the report of the stipendiary magistrate. Passing from that ground he would merely read the last ground of the petition to their Lordships without comment: "The trial of your petitioners and the circumstances out of which it arose are deemed by the people of Canada to be matters

of no ordinary importance; have divided the population into two opposing parties; and it is essential not only upon these grounds, but also from the fact that a large number of trials arising out of the same circumstances are being had before the same functionaries that the question raised by this petitioner should be adjudicated upon and settled."

The Lord Chancellor said that that might be an argument why the appeal should be heard and considered, but it was hardly a ground of appeal within the statute.

Mr. Bigham said it was a reason which might have some weight with their lordships why, if there was anything arguable in the points suggested, the appeal should be given. The learned counsel then proceeded to read the judgment delivered by Mr. Justice Killam in the Court of Queen's Bench, Manitoba, with a view of showing their lordships how the different points had been dealt with and disposed of in the court. In the conclusion he observed that the petitioner had been recommended to mercy, that he had been respited from time to time, and therefore no great harm would be done by allowing him to be further respited till the appeal could be heard.

The Lord Chancellor said he had expected to have heard something upon the question as to whether there was any appeal in a criminal case. Was there any authority for that?

Mr. Bigham cited the case of *Attorney General for New South Wales v. Bertrand* (1 Privy Council Appeals, p. 520).

The Lord Chancellor pointed out that that case turned upon the provisions of a particular statute giving in express terms an appeal.

Lord Monkswell said that their lordships had stated on one or two occasions that they had jurisdiction to entertain a criminal appeal; but, as a rule, they never did, except under very special circumstances, and then they never went into the merits and reversed the judgment below upon the merits.

Lord Hobhouse said that whenever an appeal had been allowed it had been upon the ground that justice had not been done owing to some error in procedure.

Lord Monkswell said that if the petitioner

had been tried without a jury at all that would have been a ground for appeal, but if the Privy Council sat as a Court of Criminal Appeal from the Colonies it would have to be multiplied tenfold. Every man convicted of any crime or sentenced to death in any colony would appeal as a matter of course, and be respited till the appeal was heard.

The Attorney-General pointed out that an appeal had been entertained from Canada in the case of *The Queen v. Coote* (L. R. 4 Privy Council, p. 599), but that case did not apply to the Northwest Territory.

Mr. Bigham said that in Bertrand's case it was laid down that it was the inherent prerogative right of the Privy Council to exercise an appellate jurisdiction.

The Lord Chancellor said the only question was whether Her Majesty had parted with the power. She might have parted with it by giving an absolute and final court, and therefore delegating her power to that court, or by express words have reserved the right to herself, as in the case of civil cases from Canada.

Lord Fitzgerald pointed out that there was nothing in the Act of 1880 making the decision of the Court of Queen's Bench of Manitoba final. There was only a limited appeal to that court, and therefore the inference from the act rather was that the larger right of appeal to the Queen in Council had not been abandoned.

Mr. Bigham submitted that on the authorities there was a right to allow the appeal if the circumstances were such as to justify it.

Counsel were then directed to withdraw, and their lordships deliberated for some time.

Upon the re-admission of the public, the Lord Chancellor said—Their Lordships do not think it necessary to call upon the Attorney-General. The reasons for the judgment will be delivered to-morrow morning at half-past eleven.

OCT. 22.—The Lord Chancellor delivered the following judgment:—This is the petition of Louis Riel, who was tried on the 20th of July last at Regina, in the Northwest Territory of Canada, and convicted of high treason, and sentenced to death, for leave to appeal against that conviction. It is the general rule of this committee not to grant

leave to appeal in criminal cases, except where some clear departure from the requirements of justice is alleged to have taken place. Whether in this case the prerogative to grant an appeal in criminal cases still exists, their lordships, not having heard that question argued, desire neither to affirm nor to deny; but they are clearly of opinion that, in this case, leave should not be given. The petitioner was tried under the provisions of an Act passed by the Canadian Legislature, providing for the administration of criminal justice in those portions of the Northwest Territory of Canada, in which the offence charged against the petitioner is alleged to have been committed. No question has been raised that the facts, as alleged, were not proved to have taken place, nor was it denied before the original tribunal, or before the Court of Appeal in Manitoba, that the acts attributed to the petitioner amounted to the crime of high treason.

The defence upon the facts sought to be established before the jury was that the petitioner was not responsible for his acts by reason of mental infirmity. The jury, before whom the petitioner was tried, negatived that defence, and no argument has been presented to their lordships directed to show that that finding was otherwise than correct. Of the objections apparent on the face of the petition for appeal, two points only seem to be capable of plausible, or even intelligible, expression, and they have been argued before their lordships with as much force as was possible, and, in their lordships' opinion, as fully and completely as could have been done if leave to appeal had been granted. They have also been dealt with by the judgment of the Court of Appeal in Manitoba with a patience, learning and ability that leave very little to be said upon them.

The first point is that the act itself under which the petitioner was tried was *ultra vires* the Dominion Parliament to enact. That Parliament derived its authority for the passing of the statute from the Imperial Statute, 34 and 35 Vict., cap. 28, which enacts that "the Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included

in any province." It is not denied that the place in question was one in respect of which the Parliament of Canada was authorized to make such provisions, but it appears to be suggested that any provisions differing from the provisions which in this country have been made for administration, peace, order and good government, cannot, as matter of law, be provisions for peace, order and good government in the territory to which the statute relates; and, further, that if a court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order and good government, they would be entitled to regard any statute directed to those objects, but which the court might think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact. Their lordships are of opinion that there is not the least color for such a contention. The words of the statute are sufficient to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure, as it is known and practised in this country, has been authorized in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence. Upon the construction of the Canadian Statute, 43 Vic., cap. 25, there was, indeed, a contention that high treason was not included in the words "any other crimes," but it is too clear for argument, even without the assistance afforded by the tenth section, that the Dominion Legislature did contemplate the commission of high treason as within the orbit of the jurisdiction they were creating. The second point suggested assumes the validity of the act, but is founded on the assumption that the act itself had not been complied with. By the 7th sub-section of the 76th section it is provided that "the magistrate shall take, or cause to be taken, in writing, notes of the evidence and other proceedings thereat;" and it is suggested that this provision has not been complied with, because, though no

complaint is made of inaccuracy or mistake, it is stated that the notes were taken by a shorthand writer under the authority of the magistrate and by a subsequent process extended into ordinary writing intelligible to all. Their lordships desire to express no opinion as to what would have been the effect if the provision of the statute had not been complied with, because it is unnecessary to consider whether the provision is directory only, or whether the failure to comply with it would be ground for error, inasmuch as they are of opinion that the taking full notes of the evidence in shorthand was a causing to be taken in writing full notes of the evidence, and, therefore, a literal compliance with the statute. Their lordships will, therefore, humbly advise Her Majesty that leave should not be granted to prosecute this appeal, and that this petition should be dismissed.

QUEEN'S COUNSEL.

The following barristers have been appointed Queen's Counsel:—

Province of Ontario.

Ephraim Jones Parke, Toronto. James Henry Morris, Toronto. Edward Martin, Hamilton. Charles Richard Atkinson, Chatham. Samuel Hume Blake, Toronto. Alexander Bruce, Hamilton. William Douglas, Chatham. William Nicholas Miller, Toronto. William Alexander Foster, Toronto. James Fox Smith, Toronto. James Peter Woods, Stratford. John Wesley Beynon, Brampton. Hugh McMahon, Toronto. John Idington, Stratford. William Laidlaw, Toronto. William Albert Reeve, Toronto. Robert Cassels, Ottawa. Donald Guthrie, Guelph. James Harshaw Fraser, London. Henry Becher, London. Edmund Meredith, London. Alexander James Christie, Ottawa. Colin Macdougall, St. Thomas. Henry Hutton Strathbarrie. James Thompson Garrow, Goderich. James Holmes Macdonald, Toronto. Edward Handley Smythe, Kingston. William Glenholme Falconbridge, Toronto. James Masson, Owen Sound. Alfred Passmore Pousette, Peterborough. Charles Henry Ritchie, Toronto. Charles Oakes Zaccheus Ermatinger, St. Thomas.

Province of Manitoba.

The Hon. Charles Edward Hamilton, Winnipeg. Nathaniel Francis Hagel, Winnipeg.

North-West Territories.

David Lynch Scott, Regina.

REVISING OFFICERS.

The following gentlemen have been appointed, under the provisions of the 13th Section of "The Electoral Franchise Act," to be revising officers in and for the electoral districts of the Province of Quebec, named below:—

1. Argenteuil, George Edwin Bampton, Advocate.
2. Bagot, Hubert Lippé, Notary.
3. Beauce, A. Pacaud, Advocate.
4. Beauharnois, Louis Gervais, Notary.
5. Bellechasse, Edouard M. Mackenzie, Notary.
6. Berthier, Pierre Teller, Notary.
7. Bonaventure, Gordian F. Maguire, Advocate.
8. Brome, J. M. Lefebvre, Notary.
9. Chambly, Pierre Brail, Notary.
10. Champlain, David Tancredi Trudel, Notary.
11. Charlevoix, Morille Bouchard, Advocate.
12. Chateauguay, L. J. Derome, Notary.
13. Chicoutimi and Saguenay, A. R. Hudon, Advocate; Francis H. O'Brien, Advocate.
14. Compton, J. J. Mackay, Notary.
15. Dorchester, J. B. E. Fortier, Notary.
16. Drummond and Arthabaska, Edward John Hemming, Advocate; Louis Napoleon Des Rosiers D'Argy, Notary.
17. Gaspé, Joseph X. Lavoie, Advocate.
18. Hochelaga, Jean Joseph Beauchamp, Advocate.
19. Huntingdon, John K. Elliott, Advocate.
20. Iberville, Charles Loupret, Advocate.
21. Jacques-Cartier, Leon Forest, Notary.
22. Joliette, Ernest Cimon, Judge Superior Court.
23. Kamouraska, Paschal V. Taché, Advocate.
24. Laprairie, L. A. Laberge, Notary.
25. L'Assomption, Pierre Blouin, Notary.
26. Laval, Adelard Edouard Leonard, Notary.
27. Lévis, F. X. Couillard, Notary.
28. L'Islet, I. T. Lavry, Advocate.
29. Lotbinière, Louis LeMay, Notary.
30. Maskinongé, Louis Edouard Gallipeault, Notary.
31. Mégantic, A. Schambier, Notary.
32. Missisquoi, George C. V. Buchanan, Judge Superior Court.
33. Montcalm, Joseph Laporte, Notary.
34. Montmagny, Hubert Hebert, Notary.
35. Montmorency, J. A. Charlebois, Notary.
36. Montreal West, John S. Archibald, Advocate.
37. Montreal East, Michel Mathieu, Judge Superior Court.
38. Montreal Centre, Henry John Kavanagh, Advocate.
39. Napierville, Charles Bedard, Notary.

40. Nicolet, Honoré Tourigny, Notary.
41. Ottawa, G. L. Dumouchel, Notary.
42. Pontiac, J. T. St. Julien, Advocate.
43. Portneuf, J. E. Lacoursière, Notary.
44. Quebec East, H. Adjutor Turcotte, Advocate.
45. Quebec Centre, J. Winceslas LaRue, Notary.
46. Quebec West, Laurence Stafford, Advocate.
47. Quebec County, Jules LaRue, Advocate.
48. Richmond and Wolfe, Hon. W. H. Webb, Advocate; F. A. Brien, Notary.
49. Richelieu, C. Gill, Judge Superior Court.
50. Rimouski, J. A. Mousseau, Judge Superior Court.
51. Rouville, Césaire Papin, Notary.
52. St. Hyacinthe, Antoine Olivier T. Beauchemin, Advocate.
53. St. John's, A. N. Charland, Advocate.
54. St. Maurice, Jules Milot, Notary.
55. Shefford, Joseph Lefebvre, Notary.
56. Sherbrooke, Edward T. Brooks, Judge Superior Court.
57. Soulanges, Antoine M. Pharaud, Notary.
58. Stanstead, J. B. Gendreau, Notary.
59. Temiscouata, Benjamin Dionne, Advocate.
60. Terrebonne, Bruno Nantel, Advocate.
61. Three Rivers, L. P. Guillet, Advocate.
62. Two Mountains, Antoine Fortier, Notary.
63. Vaudreuil, Francois DeCelles } Notary.
Octave Turcotte, }
64. Verchères, Adolphe Hector Bernard, Notary.
65. Yamaska, L. O. Loranger, Judge Superior Court.

GENERAL NOTES.

The decision of the House of Lords in the case of *Last v. The London Assurance Corporation*, 53 Law J. Rep. Q. B. 325, and 54 Law J. Rep. Q. B. 4, is one of the few cases in which an appeal to the House of Lords has not given a satisfactory result. The question was whether an assurance company ought to pay income-tax on the bonuses allowed in accordance with the terms of the policy to policy-holders. In the Divisional Court Mr. Justice Day was of opinion that the bonuses were not "profits;" but Mr. Justice Smith dissented. In the Court of Appeal the Master of the Rolls and Lord Justice Cotton agreed with Mr. Justice Day; but Lord Justice Lindley agreed with Mr. Justice Smith. In the House of Lords, Lords Blackburn and Fitzgerald agreed with Lord Justice Lindley and Mr. Justice Smith; while Lord Bramwell agreed with the Master of the Rolls, Lord Justice Cotton, and Mr. Justice Day. Counting heads, it is four to four. It would be a difficult matter to weigh them; but, at all events, to look on bonuses as part of the expenditure to attract customers, and therefore not profits, seems the business view of the situation. — *Law Journal*.

A person not in orders recently performed at a suburban church of London the ceremony of marriage. Is this valid? It appears to be so, unless both parties are cognizant of the officiating party's want of qualification. See *Reg. v. Millis*, 10 C. & F. 786.

The Legal News.

VOL. VIII. NOVEMBER 14, 1885. No. 46.

In the case of *Read v. Anderson* (7 Leg. News, p. 296), it was decided that a commission agent, who has lost a bet made according to agreement with his principal in the agent's own name, can recover it from the principal, although the latter directed him not to pay it. That is to say, the agent has an action against his principal for a debt arising from a betting transaction, and it seemed to follow that the principal should have a similar action against the agent, i.e., where the agent has won a bet for a client, and has received the money, he should be bound to pay it over to the principal. But against this there was the authority of *Beyer v. Adams*, 26 L. J. 841, Ch. Recently, however, the English Court of Appeal in *Bridger v. Savage*, 54 L. J. Rep. Q.B. 464, decided in July last, has overruled *Beyer v. Adams*, and holds that a better may recover from a commission agent money won by him for the better. This ruling appears to be opposed to the jurisprudence in the United States, and to several decisions of our Superior Court. But the case of *Macdougall & Demers*, which was heard before the Court of Appeal in September, will probably throw additional light upon the question.

The Montreal Law Reports, Queen's Bench Series, for September—October, comprise pages 369—432. Among the cases reported is that of *Pillow & City of Montreal*, in which an important constitutional question was decided. The case of *Fisher & Evans* furnishes a precedent in the law relating to servitudes. The decision in *Starnes & Molson* is of great importance in expropriation proceedings. The case of *McMillan & Hedge* presented an interesting question of law concerning the aggravation of a servitude in the nature of a right of way. *Macmaster & Moffatt* was a case decided in the Court below upon the question whether an agreement was complied with in due time. In appeal, the judgment was reversed upon a different ground.

NEW PUBLICATIONS.

PRINCIPLES OF CANADIAN RAILWAY LAW, with the Canadian Jurisprudence and the leading English and American Cases. By Chas. M. Holt, LL.L., Advocate. Montreal: A. Periard.

This is a work which will be found useful by those who have occasion to examine questions connected with railways and railway companies. It begins with a statement of principles based upon decisions of the Canadian Courts and the works of the leading writers upon this branch of the law. The text of the Dominion Railway Act, with the amendments up to the present date, is appended. The whole is accompanied by forms of proceedings in expropriation in Quebec and Ontario. A copious index is also furnished. The work is well printed and bound, and will form a desirable addition to the library of counsel throughout the Dominion.

COURT OF QUEEN'S BENCH.— MONTREAL.*

Contract—Time for fulfilment.

M., against whom a *capias* had issued, deposited a cheque in the hands of appellants, the agreement being that if he appeared with his bail at their office at eleven o'clock on the following morning the cheque was to be returned; if he did not appear, the cheque was to be applied to the payment of debt and costs. There was a conflict of evidence as to whether M. appeared at eleven or a few minutes after, and (as the majority of the Court viewed the evidence) one of the bondsmen agreed upon was not present.

"HELD (by the whole Court):—That a difference of a few minutes in a contract of this nature was too slight to be material, and would not have justified the application of the cheque to the payment of the debt and costs, if M. had appeared with his bail as agreed; but held by the majority of the Court, the absence of one of the bondsmen was a non-compliance with the agreement which justified the application of the cheque to the payment of the debt and costs. *Macmaster et al. & Moffatt*, Dorion, C. J., Monk, Ramsay, Cross, Baby, JJ. (Dorion, C. J., and Cross, J., diss.), May 26, 1885.

* To appear in full in Montreal Law Reports, 1 Q. B.

Audition par privilège—Procédés sommaires—Evocation.

Jugé:—Qu'un appel d'un jugement de la Cour Supérieure décidant préalablement de la validité d'une évocation de la Cour de Circuit à la Cour Supérieure, peut être entendu par privilège, la règle étant que toute cause qui doit être jugée sommairement en Cour Supérieure, peut l'être également en appel.—*Coursol et al. & Les Syndics de la Paroisse de Ste. Cuthgonde*, Dorion, J.C., Monk, Ramsay, Cross, J.J., 15 septembre 1885.

COUR SUPERIEURE.

FRASERVILLE, Dist. de Kamouraska,
18 octobre 1885.

Coram H. T. TASCHEREAU, J.

BEAULIEU, requérant v. LeBEL et al, intimés.

La Loi des Licences de Québec de 1878—Tribunal compétent.

Jugé:—*Qu'une poursuite pour contravention à "La loi des Licences de Québec de 1878" ne peut être entendue et jugée par trois juges de paix; et sur un bref de Prohibition, la sentence ou conviction rendue par trois juges de paix sera annulée et mise à néant.*

Le percepteur du revenu, pour le district de Kamouraska, fit émaner le 31 août dernier, un bref de sommation, enjoignant au requérant de comparaître, le 4 septembre dernier, devant Joseph Sirois et Jean Daniel Schmouth, deux juges de paix de Sa Majesté, pour le district de Kamouraska, résidents en la paroisse de Ste-Anne Lapocatière, pour répondre à la plainte du percepteur du revenu, LeBel, qui accusait le requérant d'avoir enfreint les dispositions de "La loi des Licences de Québec de 1878" et demandait qu'il fût condamné à payer une amende de \$100 pour récidive.

Le 4 septembre dernier, le requérant comparut par son procureur, mais au lieu de deux magistrats ainsi que prescrit par la sec. 196 du dit acte, le tribunal était alors composé de trois juges de paix. Les deux juges de paix ci-dessus nommés s'étaient adjoints un troisième, savoir: Joseph Dionne.

Le percepteur du revenu procéda à faire sa preuve devant ces trois juges de paix et le

requérant fut condamné, par le dit tribunal, composé comme ci-dessus mentionné, à payer une amende de \$100 et les frais, ou à être emprisonné, à défaut de paiement immédiat, pour l'espace de six mois.

Le procureur du requérant fit immédiatement application à l'honorable juge Taschereau, à Fraserville, pour obtenir un writ de prohibition, afin de faire annuler cette conviction, vu qu'elle avait été rendue par un tribunal qui n'était pas légalement constitué et qui n'avait pas de juridiction pour entendre et juger cette plainte.

Le dit bref lui fut accordé et après avoir entendu les plaidoiries des avocats de chaque partie la cour rendit le jugement dont voici un extrait :

"Considérant l'illégalité de la sentence ou conviction prononcée le quatre septembre 1885 à Ste-Anne Lapocatière, par les dits intimés Joseph Dionne, Joseph Sirois et Jean Daniel Schmouth, juges de paix pour le district de Kamouraska, condamnant le requérant à raison de ce qu'il aurait vendu des liqueurs enivrantes sans licence, contrairement aux dispositions du statut dans tel cas fait et pourvu, à payer à l'intimé LeBel, percepteur du revenu pour le district de Kamouraska, la somme de \$100 comme amende pour récidive en vertu de la section 223 de la loi des licences de Québec de 1878, plus \$16.25 pour frais, ordonnant le prélèvement des dites sommes par voie de saisie et vente des biens et effets du requérant, et dans le cas de défaut ou insuffisance des dits biens et effets, ordonnant l'emprisonnement du requérant pour une période de six mois dans la prison commune du district de Kamouraska ;

"Considérant que la plainte portée contre le requérant par le dit intimé LeBel ne pouvait être entendue et jugée que par les tribunaux indiqués par la loi des licences de Québec et ses amendements, et que par les dispositions législatives susdites, trois juges de paix ne forment pas un tribunal compétent et ayant juridiction pour entendre et juger semblable plainte ;

"Considérant que les dits intimés Dionne, Sirois et Schmouth n'avaient en conséquence aucune juridiction pour rendre et prononcer la dite sentence de conviction ; qu'ils excèdent encore leur juridiction en menaçant par

leur dite sentence le dit requérant de la saisie et vente de ses biens, et même de l'emprisonnement de sa personne ;

" Considérant que le défaut de juridiction est suffisamment allégué et démontré dans la dite requête libellée, et que conséquemment la défense en droit du dit intimé LeBel n'est aucunement fondée ;

" Rejette la défense en droit et les autres plaidoyers de l'intimé LeBel, maintient la requête libellée du requérant, déclare illégale et nulle, et met à néant la dite sentence ou conviction, enjoint et ordonne aux dits intimés LeBel, Dionne, Sirois et Schmouth de cesser tous procédés déjà commencés en vertu de la dite sentence ou conviction, et leur défend tous procédés ultérieurs en vertu d'icelle, le tout avec dépens personnellement contre le dit intimé LeBel qui seul a contesté la demande, distracts, etc."

Charles Poucaud, procureur du requérant.

Taché & Taché, procureurs des intimés.

Autorités citées par le procureur du requérant: " La loi des licences de Québec de 1878," secs. 196, 220, 221; *Paige v. Griffith*, 18 L. C. J. 119; Statuts de Québec, 34 Vict., c. 2, sec. 153, 37 Vict., c. 3, sec. 14.

SUPERIOR COURT.

MONTREAL, October 3, 1885.

Before DOHERTY, J.

THOMPSON v. THE MOLSONS BANK.

Action—Creditor claiming account of moneys collected for insolvent debtor—Demurrer.

The plaintiff in this cause sued, setting up that he was a creditor of the insolvent firm of Haldane, Haswell & Co., and alleging that the defendants had in their possession large sums arising from the sale of collateral security deposited with them for paper discounted for that firm before its insolvency, and which was not met at maturity ; that the firm of Haldane, Haswell & Co. had become insolvent and had assigned in trust all its rights and assets to one Stevenson, in which assignment the plaintiff and defendants had acquiesced, and plaintiff prayed that an account might be rendered to him or the assignee, and the balance due Haldane,

Haswell & Co.'s estate paid in for the benefit of the creditors as the *gage commun*.

The defendants demurred to this declaration on the grounds that no privity of contract between plaintiff and defendants was alleged ; that the only party entitled to sue was the firm of Haldane, Haswell & Co. or their legal representative, it not being alleged that plaintiff was such ; that the alleged insolvency and assignment did not prevent the firm of Haldane, Haswell & Co. or the assignee bringing suit ; nor did the assignment give plaintiff any greater rights than he would have had otherwise ; that there was no fraud alleged, and that therefore no grounds or rights of action on plaintiff's behalf were disclosed.

At the argument it was submitted on behalf of the defendants that the plaintiff must either sue in his own right or as representing his debtors, Haldane, Haswell & Co. As to his own rights he had none as against defendants, between whom and himself there was no privity or *lien de droit*. The rights of Haldane, Haswell & Co., he did not pretend to be subrogated in, and moreover he expressly alleged that they were all vested in the assignee. C.C. 1031 differs from the Code Napoléon Article 1166, the last paragraph of which does not include the words, " Lorsque à leur préjudice il refuse ou néglige de le faire."

The essentiality of allegations of the debtor's neglecting or refusing to exercise his rights to creditor's prejudice was a question even in France under the Code Napoléon as it stands : and no doubt can exist in Quebec inasmuch as our Code expressly lays it down.

If it were possible for plaintiff to obtain the money or an account without pretending that he was exercising Haldane, Haswell & Co.'s rights it could only be done by *saisie-arrest*. Authorities in support of these positions are found under Art. 1031 C.C.

The plaintiff's counsel in reply urged that he was exercising his own rights, privity being entirely unnecessary. Article 1981 of the Civil Code provides that the goods of a debtor are the common pledge of his creditors, and plaintiff was exercising his rights in this respect. That defendants had got

into their possession property of the firm of Haldane, Haswell & Co., in which plaintiff was entitled to share as creditor, and that in their refusal to recognise his rights he was entitled to bring an action against them to compel them to do so.—C.C. 1981, 7 L.N. 274, *Boisseau & Thibadeau*.

The Court after briefly stating the allegations of the declaration did not think the declaration demurrable.

Demurrer dismissed.

Robertson, Ritchie, Fleet & Falconer, Attorneys for plaintiff.

Abbott, Tait & Abbotts, Attorneys for defendants.

(c.s.c.)

COUR D'APPEL DE PARIS (FRANCE).

22 avril 1885.

M. ROUSSELLE, *Président*.

LEFÈVRE et PALADE.

Saisie-arrêt—Dépôt en cour—Droit du saisissant.

JUGÉ :—10. *Que la Cour ne peut, sans le consentement du créancier saisissant, autoriser le débiteur à toucher des mains des tiers-saisis les sommes d'argent saisies-arrêtées, lors même que le défendeur offrirait de déposer en Cour le montant suffisant pour désintéresser le créancier saisissant, ce dépôt ne pouvant offrir à celui-ci les mêmes sûretés, ni produire les mêmes effets que la saisie-arrêt.*

20. *Que le privilège est un droit qui résulte de la qualité de la créance, et qu'un tribunal ne peut étendre les privilèges créés par la loi.*

Le jugement suivant de la Cour d'Appel renferme tous les faits de la cause :

La Cour....

Donne acte à Lefèvre, cessionnaire de Dubreuil de sa reprise d'instance ;

Au fond :

Considérant qu'en vertu d'un jugement rendu par défaut à son profit contre Palade par le tribunal de commerce de la Seine le 12 janvier 1884, Dubreuil a formé des saisies-arrêts sur ledit Palade entre les mains des locataires d'immeubles appartenant à celui-ci ; que ledites saisies-arrêts ont été régulièrement dénoncées et contre dénoncées ; que

Palade ayant constitué avoué sur la demande en validité a suivi l'audience, et conclu à ce qu'il plût au tribunal l'autoriser moyennant le dépôt à la Caisse des Dépôts et Consignations de telle somme complémentaire que le tribunal fixerait avec affectation spéciale aux éventualités de la créance de Dubreuil, à toucher des mains de ses locataires les loyers de ses maisons, et ce, nonobstant les oppositions de Dubreuil et toutes autres qu'il pourrait former ultérieurement ;

Considérant que Dubreuil, loin d'adhérer à cette demande, a conclu à ce qu'il plût au tribunal déclarer Palade purement et simplement non recevable, en tous cas mal fondé en sa demande incidente, et l'en débouter ;

Considérant que c'est dans cet état de la procédure qu'est intervenu le jugement dont est appel ;

Considérant que c'est à tort que les premiers juges ont, malgré la résistance de Dubreuil, autorisé Palade moyennant le dépôt d'une somme de 20,000 francs avec affectation spéciale aux éventualités de la créance de Dubreuil, à toucher des mains des tiers saisis les sommes arrêtées ;

Considérant en effet qu'ils n'ont pas pu, sans le consentement de Dubreuil, affecter spécialement à sa créance les sommes qui seraient déposées, et créer à son profit un privilège sur ledites sommes ;

Considérant qu'aux termes de l'article 2095 du Code civil, le privilège est un droit qui résulte de la qualité de la créance ; que les privilèges sont énoncés limitativement dans les articles 2100 et suivants du Code, et que les juges n'ont pas le droit d'en créer ;

Considérant que si Dubreuil avait consenti à accepter l'affectation spéciale à lui proposée, il serait intervenu entre les parties un contrat judiciaire, que la somme déposée se serait trouvée affectée spécialement à la créance de Dubreuil, soit comme formant l'objet d'un transport conditionnel, Dubreuil étant saisi en conformité de l'article 1690, par la signification du transport, faite à la Caisse des Consignations dépositaire, et par suite débitrice de la somme cédée conditionnellement, soit à un autre point de vue, comme constituant un gage déposé conformément à l'art. 2076 en la possession de la Caisse des Consignations, tiers convenu entre les parties ;

Considérant que le consentement des deux parties est nécessaire pour la constitution soit du contrat de cession de créance, soit du contrat de gage ; que le consentement de Dubreuil faisant défaut, il n'y a ni transport conditionnel, ni constitution du gage, ni par suite affectation spéciale à la créance de Dubreuil des sommes consignées ; que le tribunal n'a pu, de sa propre autorité, constituer et établir au profit de Dubreuil un privilège qui n'est écrit nulle part dans la loi ; que par suite les oppositions qui surviendraient ultérieurement sur Palade, frapperaient utilement la somme déposée par Palade et ses locataires ; que Dubreuil, au cas où une contribution viendrait à être ouverte sur ladite somme ne pourrait prétendre à une collocation privilégiée, et serait tenu de venir au marc le franc avec les créanciers postérieurs de Palade ;

Par ces motifs,

Infirme,

Et statuant à nouveau,

Déclare Palade mal fondé dans sa demande.

(J. J. B.)

REGULATIONS OF THE CENTRAL BOARD OF HEALTH.

In an *Extra* of the *Quebec Official Gazette*, 7th Nov., 1885, the following by-laws passed at Montreal by the Central Board of Health, P.Q., 31st Oct., 1885, are promulgated:—

Duty of Municipal Councils.

1. Every city or town council, and every local municipal council within the province of Quebec, shall appoint immediately, if none has yet been appointed, a local board of health for its municipality, in conformity with the provisions of chap. 38, of the Consolidated Statutes of Canada.

Duties of Municipal Corporations.

2. Every city, town or other local municipal corporation within the province of Quebec, shall:—

A.—Establish and provide without delay an hospital or a suitable house, in an isolated place, to receive therein patients affected with small-pox in the municipality.

B.—Establish and provide, upon being required thereto by the local board of health, in the municipality, suitable houses to re-

ceive patients suspected of suffering with small-pox, until the nature of the disease has been ascertained, and other suitable houses to receive persons compelled to vacate their lodgings, pending the disinfection of the same.

C.—Supply the local board of health with suitable vehicles for the transportation of small-pox patients, and of the bodies of those who have died of small-pox.

D.—To cause all public places, streets, lanes, public and private property, and all buildings and appurtenances situate within the municipality to be cleansed, and kept in a suitable state of cleanliness.

E.—To aid as much as in their power lies the local board of health, and the officers thereof, in the execution of their duties.

Duties and powers of Local Boards of Health.

3. Every Local Board of Health shall:—

A.—Conform to the instructions of the Central Board of Health.

B.—Execute and cause to be executed with care and diligence the regulations of the central board of health.

C.—Fulfil any of the obligations imposed upon municipal corporations by article 2, sections A. B. C. D., of these regulations, upon refusal or negligence by the said municipal corporations of fulfilling the same.

D.—Cause to be posted on churches, public markets and the town-hall, the regulations of the central board of health at one or more conspicuous places, where they can easily be read.

E.—Visit and cause to be visited by its officers, at reasonable times, during the day, all houses and buildings, and public and private property, situate within the municipality, in order to ascertain whether such houses, buildings and property are kept in a suitable state of cleanliness and whether any case of small-pox exists therein, and in order to execute and cause the regulations of the central board of health to be executed.

F.—Cause to be isolated and to be kept isolated at the domicile, every patient suffering, or suspected of suffering from small-pox, if such isolation is practicable in the opinion of its officer, so long as the disease and the danger of contagion exist.

G.—Cause the front of the house or lodging in which a case of small-pox exists, to be placarded and kept placarded, according to articles 16, 17 and 18 of these regulations, and supply such placards gratuitously to persons asking for them.

H.—Cause the body of any person who has died of small-pox to be buried according to the provisions contained in the present regulations Nos. 28, 29, 30, 31 and 32.

I.—Cause to be disinfected every house or building where small-pox has existed, and every vehicle in which a small-pox patient has been conveyed, and all things and effects which may have been used by or for such patient.

J.—Provide pure vaccine lymph, the source of which shall have been approved by the central board of health, and offer free vaccination to all who have not already been vaccinated, as well as to all who must be re-vaccinated.

K.—Compel every person to be vaccinated in conformity with articles 7, 8, 9, 10 and 11 of these regulations.

L.—Grant certificates of vaccination gratuitously, whenever required, to every person entitled thereto.

M.—Report to the central board of health all cases of small-pox as soon as ascertained.

4. Every local board of health may :

A.—Cause to be removed to the houses set apart for such purpose any person suspected of suffering from small-pox, and to the small-pox hospital any person suffering therefrom, if in the opinion of the health officers, isolation at the domicile is not practicable, or if the health officers are prevented from effecting such isolation, or if the persons having the care of the patient refuse or neglect to follow their instructions.

B.—Order the closing of any shop, office, saloon, work shop, or other place of business situate in a house in which a case of small-pox exists, and order the same to remain closed until the danger of contagion shall have passed, and the house has been disinfected.

C.—Compel the occupants to vacate any house or building where there is or has been a case of small-pox, in order that it be disinfected.

D.—Prevent, when small-pox exists in a municipality, from being carried on within the whole or part of the same, any trade or business by which the disease may be spread.

5. All the powers conferred upon the local board of health may be exercised, and the duties imposed by the same may be performed by any officer thereto authorized by the same.

Duties of proprietors of Cemeteries.

6. Proprietors and managers of all cemeteries for any municipality, shall cause the body of any person who has died from small-pox, within the limits of such municipality, to be buried under ground, and they are forbidden to allow the body of any person whatever who has died from small-pox to be placed in their vault.

Vaccination and revaccination certificates.

7. Every person who has not been vaccinated shall be vaccinated within eight days from the promulgation of these regulations.

8. Every person who has not been vaccinated successfully within five years, shall be vaccinated within a delay of eight days from the promulgation of these regulations.

Dwelling Houses to be kept clean.

9. Every person having the care of a child in any capacity whatever, shall cause it to be vaccinated, if it has not already been successfully vaccinated, within the same delay of eight days.

10. After the expiration of such delay, every person mentioned in articles 7, 8 and 9 of these regulations shall exhibit, to any health officer requesting it, a certificate of such vaccination or revaccination, but the said health officer shall have the right to examine every person to ascertain that the same has taken place.

11. Any person going to or coming from a locality where small-pox exists must produce a certificate of vaccination, and also a certificate attesting that he has not been exposed to the contagion within the last fifteen days preceding; failing either of which it will be the right of the officer of the municipality to forbid such person to enter or depart as the case may be.

Keeping lodgings clean.

12. Every proprietor who occupies a house, every tenant and every occupant of a house, is bound to maintain the same, and the appurtenances thereof in a suitable state of cleanliness, to the satisfaction of the local board of health.

13. No person shall oppose any visit made at reasonable times, during the day, by the health officers, under the regulations of the central board of health.

Obligation to report small-pox cases.

14. The head of a family in which a case of small-pox has broken out shall be bound to give notice thereof to the local board of health as soon as it may come to his or her knowledge.

15. Every physician must give notice to the local board of health of any case of small-pox to which he has been called professionally.

Placards.

16. The placards which must be posted as aforesaid, shall be printed in letters not less than four inches in length, the placard itself being at least two feet long and one foot six inches wide.

17. Every head of a family occupying the house shall be responsible for the placard inasmuch as he must replace the same every time it is destroyed or defaced.

18. Every placard must remain posted until after the disinfection of the house to the satisfaction of the local board of health.

Isolation—Schools.

19. Every person having the care of a small-pox patient, must keep him isolated according to the instructions received from the health officer.

20. No person suffering from small-pox shall expose himself in any street, church, school, chapel, theatre or other public place, or in any omnibus or any other public conveyance, and any person in charge of any one so suffering from small-pox who exposes the sufferer in any place above mentioned, shall be liable to the penalties imposed by law upon any person contravening to the present regulations.

21. No person residing in a house wherein

small-pox exists shall take part in any public or private gathering, nor shall exercise any profession or trade which shall place him in contact with others.

22. Parents and guardians must prevent their children or pupils from attending schools or other gathering places when small-pox exists in the house where such pupils reside, until after fifteen days following the disinfection of the house.

23. The directors and professors of educational establishments shall exact from time to time from the parents or guardians of their pupils, a certificate countersigned by a physician that no small-pox exists in the house where such pupils reside, and such certificate shall be kept for the inspection of the health officer.

24. The directors and professors of any educational establishment shall refuse admission into it of any pupil residing in a house where small-pox exists until after fifteen days following the disinfection of the same.

25. The directors and professors of any educational establishment shall refuse admission into it during a period of fifteen days of any pupil who shall have visited a house in which small-pox exists, or shall have attended the funeral of a person who has died from small-pox.

Conveyance of small-pox patients.

26. The conveyance of any person suffering from small-pox shall be made exclusively in vehicles specially for that purpose and approved of by the local board of health.

27. No small-pox patient shall be conveyed from one municipality into another, without the permission of the local board of health of the municipality to which the patient is being conveyed.

28. The central board of health may give such permission.

Interments of persons who have died of small-pox.

29. The bodies of those who have died from small-pox shall be buried underground in the cemetery of the municipality within which they have died.

30. The bodies of all persons who have died from small-pox shall be buried underground within twelve hours of their death.

31. The bodies shall be taken directly to the cemetery and the funeral shall be strictly private.

32. The conveyance of the bodies of all persons who have died from small-pox, shall be made exclusively in vehicles specially set apart for that purpose, and approved of by the local board of health.

Disinfection.

33. Every person is bound to allow his residence to be disinfected by the officer of the local board of health, and to vacate the same for the purpose if required thereto.

34. No person shall rent a house or tenement wherein small-pox shall have existed without causing it to be disinfected to the satisfaction of the local board of health.

35. No article which has been in immediate or mediate contact with a patient suffering from small-pox shall be removed before it has been disinfected.

Sales, &c., of articles infected prohibited.

36. No person shall give or sell any articles, merchandise, products, milk, bread, provisions, &c., if such are coming from a house or property in which small-pox exists or if they are liable to convey the disease.

Power of Central Board of Health to inspect.

37. The Central Board of Health, by any of its members or a person authorised thereto, may, at reasonable times, during the day, visit all public or private property and all houses, tenements and appurtenances within the Province, to ascertain the state of the public health and that its regulations are duly executed.

Penalties.

38. Whosoever refuses or neglects to conform to any of the aforesaid regulations or willingly obstructs any person in the execution of any of them, or willingly contravenes any of the same shall incur the penalty imposed by cap. 38, of the consolidated statutes of Canada.

Previous rules and regulations abrogated.

39. All regulations passed by the central board of health before this date are repealed, except those which concern the imposition and recovery of penalties incurred until this date.

RECENT U. S. DECISIONS.

Innkeeper—Suit for Accommodation and Board—Guest's clothing stolen.—In an action by an innkeeper against a guest to recover for board and accommodation, the defendant may recoup his damages for the value of clothing stolen from his room. It appeared that before the theft, the following printed regulation was posted in the rooms of the inn: "Lock the door when going out and leave the key at the office"; defendant knew of the regulation, and on the occasion when his clothing was stolen, failed to leave his key at the office. The court ruled as matter of law, that defendant having failed to leave his key at the office on the occasion in question, was not entitled to recoup the value of the clothing stolen. *Held* erroneous; that in the absence of any express contract, an innholder is relieved from liability for loss, only when, in the words of the statute, such loss is attributable to the non-compliance with the regulation. At common law innholders, like common carriers, are regarded as insurers of the property committed to their care, and are liable for any loss not caused by the act of God, or of a public enemy, or by the neglect or fault of the guest. *Mason v. Thompson*, 9 Pick. 280; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417. Our statutes have in some respects limited this extreme liability. Pub. Stat., ch. 102, §§ 12-16. The statute exonerates an innholder from his common-law liability for a loss sustained by a guest, who has knowingly failed to comply with a reasonable regulation of the inn, if the loss is attributable to such non-compliance. The ruling of the Superior Court went further and held that an innholder is exonerated by the fact of non-compliance, without any inquiry into the question whether the loss was attributable to the non-compliance. The law will not imply a contract against the guest more extensive than the terms of the statute, and in a case like the one before us, in the absence of any express contract, an innholder is relieved from liability for loss, only when, in the words of the statute, such loss is attributable to the non-compliance with the regulations of the inn. *Burbank v. Chapin*. Maine Supreme Judicial Court. Opinion by Morten, C. J. (Sept. 21, 1885.)

The Legal News.

VOL. VIII. NOVEMBER 21, 1885. No. 47.

The reforms suggested by a country lawyer in the present issue would merely shift the inconvenience. If the Court of Review were abolished the number of appeals would be trebled. Why should parties be subjected to the heavy costs of an appeal when they are willing to submit to the judgment of a comparatively inexpensive and much more summary tribunal? In theory the Court of Review is admirable, and in practice it works as satisfactorily as any court we ever heard of. If there were three or four Divisions sitting in appeal, it would simply be a Court of Review under another name, and it would be necessary to have a higher provincial court, for otherwise the Supreme Court would soon be blocked by the immense increase in the number of appeals that would certainly result from such a change in the system. The criminal business assigned to the Queen's Bench does not cause any obstruction at present, for a sixth judge was some years ago added to the court in order that one might always be available for the criminal work without interfering with the civil terms. It may be added that the appeal work is less than a year in arrear, and "Reform" must be unacquainted with the system if he has attended four terms without being heard, for unless a case is among the first thirty or forty on the list there is no need to come at all, and when it does attain that position it is sure to be called either that term or the next.

We are glad to state that the bench and bar of Montreal have enjoyed perfect immunity from the epidemic which is now happily declining. So far as we can learn there has not been a single case of illness from small-pox among the members of the profession. This is natural enough, for none better than a hard-working and clear-headed fraternity can appreciate how much truth there is in the old pagan maxim that "the gods help those who try to help themselves."

It is difficult for persons at a distance to realize how carefully small-pox pursues those, and those only, who are unwilling to protect themselves.

It has been said, however, that the initiation of new business has been somewhat interfered with by the epidemic. If so, the bar have had more leisure to devote to their old cases, for the appeal list, notwithstanding a great clearance effected in September, has crept up from 93 to 104 cases,—an increase of 14 as compared with the November term of last year.

The *Legal Adviser* (Chicago) refers to an inconvenience which has been pretty generally experienced. It says the use of shorthand in the trial of causes "is having the effect of greatly lengthening out the record, making it expensive in case of appeals, requiring also a great deal of time in examining a case on the hearing on appeal." The subject attracted attention at the recent session of the American Bar Association, and the following suggestion was adopted:—"The record of a trial should contain shorthand notes of all oral testimony, written out in long hand, and filed with the clerk; but only such parts should be copied and sent to an appellate court as are relevant to the point to be discussed on the appeal; and if more be sent, the party sending it should be made to pay into court a sum fixed by the appellate court, by way of penalty."

COURT OF QUEEN'S BENCH.

QUEBEC, Oct. 8, 1885.

DORION, C.J., RAMSAY, TESSIER, CROSS, BABY, J.J.
ROY (def. below), Appellant, & LEPAGE (plff. below), Respondent.

Action—Surety—Transfer.

D. being indebted to R., in order to get time to pay, induced F. to give an obligation to R. as if F. was R's personal debtor. Subsequently D. settled with R. who transferred F's obligation to him, and D. transferred the same to the plaintiff who sued R. thereon.
HELD:—That even if the plaintiff obtained the transfer for value, he had no action against R., his action, if any he had, being against F.

RAMSAY, J. Dulac was indebted to Roy,

and in order to get time to pay, he induced his brother-in-law, Fortier, to give an obligation to Roy as if Fortier was Roy's personal debtor. Subsequently Dulac settled with Roy, how we cannot find out precisely, owing to the contradictory and confused mode in which Dulac tells the story; but, at any rate, he disinterested Roy, and then asked him to transfer Fortier's obligation to him. Dulac then transferred the obligation to Lepage, the respondent, who sued the appellant Roy. To this action Roy pleaded—1st, that Lepage should discuss Fortier before suing him; 2nd, that the deed from Fortier was given to him as security for Dulac's debt, that it was by error he transferred it to Dulac, and that he got no value for it. Dulac admits the whole of this. He says it was a security deed only, and that he got it transferred by Roy "*pour sauver ce que l'on appelle l'autre garantie de l'acte.*" What Mr. Dulac means by this mysterious phrase is that Fortier owed him, and that he had therefore a right to sue Fortier on the deed by which Fortier declared he owed Roy. He is then asked "*vous saviez n'est-ce pas qu'il y avait un recours à exercer contre M. Roy pour le montant de ce transport qu'il vous faisait.*"

R. Contre M. Roy ?

Q. Le défendeur en cette cause ?

R. Je n'ai pas compris cela dans le temps.

Nevertheless he immediately transferred this obligation, *par délicatesse de famille*, to Lepage, who at once sued Roy. Under this evidence it appears indubitable that Dulac had no action at all against Roy, and that unless Lepage has greater rights than his vendor had to transfer, he could have no action against Roy.

Now as to Lepage's rights, we do not find it necessary to say whether a *bona fide* purchaser of a notarial obligation secured by hypothec cannot, in any case, recover against the debtor, who has paid, for that question does not arise here. Lepage bought an obligation which on the face of it was a sale of Roy's rights, if any he had, and specially without warranty. He therefore has no recourse against Roy who has not failed in the execution of his obligation. It is also to be remarked that the transfer does not identify

the obligation except by the accidental coincidence of the amount transferred. If Lepage really obtained the transfer for value, his action, if any he has, is against Fortier.

The Court being of this opinion, it is hardly necessary to examine the exception of discussion, which would probably be good if it stood alone, but as it is followed by a denegation of indebtedness it ceases to be of any value. The appellant has, however, made a special argument based on the rule *qui exipit non faletur*. This rule is perfectly true in its proper limits. An exception does not confess the conclusions of the action, it avoids them. Hence in English pleading it was called confession and avoidance. No authority has ever pretended that the issues were not or might not be limited by the disclosures of an exception. How far depends on the subject matter and the nature of the exception.

Judgment reversed.

COURT OF QUEEN'S BENCH.

QUEBEC, Oct. 8, 1885.

DORION, C.J., MONK, RAMSAY, CROSS, BABY, J.J.

DULAC, Appellant, & BOLDOC, Respondent.

Damages—Delay to pay money—Interest—C. C. 1077.

This was an action to recover money from the appellant which he had received to pay on account of respondent to Messrs. Chinic & Beaudet in Quebec. Two objections were raised to the action: 1st, that respondent had no right to bring the action; 2nd, that the amount was too great (a) in that respondent sought to recover more money than he had paid to appellant, (b) and a charge of ten per centum.

The Court was of opinion that the judgment as to the amount paid to appellant was correct, and that the ten per centum was due.

RAMSAY, J., thought that although the obligation to Chinic & Beaudet bore interest at the rate of ten per cent., the appellant, for failure to pay money, could not be charged with any greater damages than the legal rate of interest. Art. 1077, C.C.

Judgment confirmed.

**COURT OF QUEEN'S BENCH—
MONTREAL.***

Rente constituée—Tiers-détenteur—Art. 338, C.C.

JUGÉ:—1. Que depuis la mise en vigueur du Code Civil le tiers-détenteur d'un immeuble affecté au paiement d'une rente constituée créée pour le paiement du prix de vente, n'est pas personnellement responsable du paiement de cette rente.

2. Que ce principe établi par le Code Civil s'étend à une rente constituée créée par un acte passé avant le code. *Wright & Moreau et ux.*, Dorion, J.C., Monk, Cross, Baby, J.J., 27 janvier 1885.

SUPERIOR COURT—MONTREAL.*

Goods sold and delivered—Evidence—Pass-book or tally—Failure by customer to produce.

HÉLD:—Where dealings between the parties have been conducted upon the basis of pass-books held by each, the one presumably the counterpart of the other, the one which is produced, and which is reasonably substantiated by testimony, must prevail,—particularly in the absence of secondary evidence founded upon the proved loss of the other, tending to show a discrepancy. *Gaudry et vir v. Judah*, In Review, Johnson, Doherty, Jetté, J.J., Oct. 31, 1885.

CIRCUIT COURT.

MONTREAL, Nov. 10, 1885.

Before TORRANCE, J.

SOUCIS v. BUCHANAN.

Jurisdiction—Dismissal of action on motion.

HÉLD:—*That an action manifestly beyond the jurisdiction of the Court may be dismissed on motion, even after plea filed.*

This action was to recover possession of a horse of a pretended value of \$115, or to obtain a receipt for \$33.35 and the balance of the price of the horse, viz., \$81.65.

The defendant, citing *Saxton v. Paradis*, M. L. R., 1 S. C. 437, moved to dismiss, after filing pleas to the merits and a demur-

rer under reserve of his objection to the jurisdiction.

The plaintiff desisted from his demand of a receipt after service of the motion.

Motion granted, with costs of a motion only.

P. U. Renaud for the plaintiff.

McGibbon & McLennan for the defendant.

COUR DE CASSATION (FRANCE).

14 janvier 1885.

M. BÉDARRIDES, Président.

EYNARD ET AL. et MOHAMED ET AL.

Acte authentique—Preuve testimoniale—Cas où elle est admise.

JUGÉ:—*Que la preuve testimoniale outre et contre le contenu d'un acte authentique ne peut être admise que lorsqu'il y a un commencement de preuve par écrit, ou dans les cas de dol, de fraude ou par inscription de faux, mais la vérité des déclarations faites par les parties dans l'acte peut toujours être combattue par la preuve contraire.*

L'action était en nullité d'un acte de vente de Mohamed et al. à Eynard et Chevrier le 11 septembre 1874. Le preuve offerte se formait de présomptions de faits et de témoignages portant sur les personnes présentes à la vente, sur la qualité des parties à l'acte, et autres choses constatées dans l'acte même.

L'arrêt de la Cour d'Alger avait annulé l'acte sur cette preuve.

Autorités au soutien du pourvoi en Cassation :

Cass. 13 juillet 1874 (S. 75. 1. 11—J. du P. 75. 15—D. 75. 1. 87); 19 décembre 1877 (S. 78. 1. 169—J. du P. 78. 411—D. 78. 1. 176) *Sic* : Larombière, Traité des Obligations, art. 1319, Nos. 5 et suiv.; Bonnier, Traité des Preuves, t. II, No. 507; Aubry et Rau, t. VIII, § 755, p. 210 et sui.; Demolombe, Contrats et Obligations, t. VI, Nos. 271 et suiv.; Colmet de Santerre, Obligations, No. 282 bis IV et suiv.

La Cour de Cassation cassa cet arrêt par le jugement suivant :

La Cour....

Sur le premier moyen du pourvoi :

Vu les art. 1319, 1341 et 1373 C. civ.;

Attendu qu'aux termes des articles susvisés, l'acte authentique fait pleine foi des conven-

* To appear in full in Montreal Law Reports, 1 Q. B.
* To appear in full in Montreal Law Reports, 1 S. C.

tions qu'il renferme ; qu'il ne peut, par suite, être reçu aucune preuve par témoins, ni aucune allégation de présomptions non établies par la loi, contre et outre le contenu du dit acte, sauf les cas de dol ou de fraude, et l'effet de l'inscription de faux ;

Attendu que, pour prononcer la nullité de la vente du 11 septembre 1874, consentie à Eynard et Chevrier par les consorts Ahmed-ben-Hadj et les autres arabes y dénommés, l'arrêt attaqué (Alger, 9 juin 1881), s'est fondé uniquement, et sans qu'aucun commencement de preuve par écrit ait été rapporté et qu'aucun fait de dol ou de fraude ait été formellement articulé par les défendeurs, sur une série de présomptions non admises par la loi, de l'ensemble lesquelles il serait résulté que, soit quant à l'objet vendu, soit quant au paiement du prix et aux quittances données par les vendeurs ou leurs mandataires, soit quant aux conditions de la vente, le contrat n'aurait point eu lieu avec le consentement libre et éclairé des arabes vendeurs ;

Attendu que les stipulations de l'acte du 11 septembre 1874 sont sur tous les points aussi claires que précises ; que les prétendues erreurs signalées par l'arrêt attaqué ne seraient fondées que sur des présomptions non établies par la loi et contraires aux énonciations formelles du dit acte ; que, notamment, quant aux allégations de l'acte touchant aux pouvoirs remis aux mandataires par les arabes non présents à la vente, et par les tuteurs des mineurs, ces présomptions sont en contradiction manifeste avec les termes mêmes des procurations annexées à l'acte de vente et en faisant partie intégrante ; que, plus particulièrement pour les mineurs, l'acte de vente exprime qu'il est fait non seulement par leurs mandataires, délégués du cadi, tuteur de ces pupilles de la justice musulmane, mais que le cadi assistait en sa qualité à la vente, et en approuvait toutes les stipulations ; que, dans de telles circonstances, l'arrêt attaqué, basé uniquement sur des présomptions de l'homme, sans qu'aucune des conditions ci-dessus indiquées en justifiait l'admission, a violé les art. 1319, 1341 et 1353 invoqués par le pourvoi ;

Par ces motifs, et sans qu'il soit besoin de statuer sur le second moyen,

Casse, etc.

(Rapport de M^{re} Greffier.)

(J. J. B.)

COUR DE CASSATION (FRANCE).

20 mai 1885.

M. BÉDARRIDES, *Président*.

WADINGTON V. CRÉDIT LYONNAIS.

Saisie-arrest—Tiers-saisi—Dépens.

JUGÉ :—*Que le tiers-saisi qui, lorsqu'une contestation s'est engagée entre les autres parties, au lieu de rester simple spectateur, a pris fait et cause pour l'une d'elle, peut être condamné conjointement et solidairement aux dépens avec elle.*

Voici les considérants du jugement. Le dernier seul se rapporte au jugé ci-dessus, les autres sont entièrement étrangers à notre procédure :

“ La Cour....

“ Sur les premier et deuxième moyens : (sans intérêt) ;

“ Sur le troisième moyen pris de la violation des règles du Code de procédure en matière de saisie-arrest, et notamment de l'art. 570 :

“ Attendu que Wadington n'a pas demandé son renvoi devant le juge compétent en vertu de l'art. 570 du Code de Pr. Civ. ; qu'il s'est borné à conclure à sa mise hors de cause et qu'il a été statué sur ses conclusions dans les termes mêmes où elles ont été prises ; que ce moyen manque donc aussi en fait ;

“ Sur le quatrième moyen tiré de la violation des règles du Code de procédure en matière de saisie-arrest, notamment de l'art. 570, de la fausse application de l'art. 130 du même Code et des art. 1382 et suivants et 1202 du Code civil :

“ Attendu qu'il résulte des constatations de l'arrêt que, loin de rester, comme il le prétend, simple spectateur dans la cause, Wadington y a joué un rôle actif ; qu'il s'est associé, dans des conditions considérées comme blâmables par la Cour d'appel, à la résistance induite que, d'accord avec lui, les saisissants ont opposé à la demande légitime du Crédit lyonnais ; qu'en le condamnant par suite, à titre de dommages-intérêts, aux dépens solidairement avec ces derniers, la décision attaquée n'a violé aucune règle du Code de procédure, ni aucun des articles précités ;

" Par ces motifs,
" Rejette, etc."

Le rapporteur, M^{re} Petit, accompagne son rapport des remarques suivantes :

Sur le deuxième point : Ordinairement, en effet, le tiers-saisi, tant que sa déclaration affirmative n'est point constatée, doit être considéré comme un simple témoin du débat qui s'agit entre le saisissant et la partie saisie. Mais il cesse évidemment d'en être ainsi lorsque ce tiers-saisi au lieu de garder ce simple rôle de témoin, de spectateur, est intervenu spontanément dans le débat, et a pris fait et cause pour l'une des parties. En agissant de la sorte, il est devenu lui-même partie au débat, et peut être condamné aux dépens, s'il succombe dans ses prétentions. Si ses agissements ont, en outre, été blâmables vis-à-vis de la partie qui a eu gain de cause contre lui, il peut, en outre, évidemment être condamné à des dommages-intérêts, et si les dommages-intérêts alloués consistent précisément dans les dépens de l'instance, rien n'empêche qu'en condamnant au paiement des dits dépens, au même titre, la partie aux prétentions duquel il s'était indûment associé, le tribunal, qui prononce cette double condamnation la déclare solidaire ; *Cass.* 14 août 1867 (S. 67. 1. 401.—J. du P. 57. 1079) ; 25 juillet 1870 (S. 72. 1. 122).

(J. J. B.)

COUR DE CASSATION (FRANCE).

27 avril 1885.

M. BÉDARRIDES, *Président*.

SAMSON ET AL. et ADAM.

Considérons des jugements—Motifs implicites sont suffisants.

JUGÉ :—Que des considérants ou motifs implicites sont suffisants pour satisfaire à la nécessité imposée par la loi aux juges de motiver leur jugement.

La Cour d'Appel avait confirmé le jugement de la cour de première instance condamnant les défendeurs en garantie, d'après les résultats d'une analyse chimique d'où dépendait la cause. Le seul considérant de la Cour d'Appel était " que d'après l'analyse chimique, pris pour valable, la demande en garantie se trouve justifiée."

Les défendeurs se pourvoyèrent en Cassation contre ce jugement prétendant qu'il n'était pas suffisamment motivé.

Le pourvoi fut rejeté par le jugement suivant :—

" La Cour....

" Sur le moyen unique pris de la violation de l'art. 7 de la loi du 20 avril 1810 ;

" Attendu que les demandeurs se plaignent que l'arrêt attaqué ait rejeté sans motif les deux chefs de leurs conclusions d'appel relevant : 1^o. le défaut d'identité de l'échantillon analysé avec la marchandise livrée ; 2^o. l'irrégularité de l'expertise, base de la condamnation en garantie ;

" Attendu, sur le premier point, que l'identité est affirmée par les motifs du jugement adopté par la Cour d'appel ;

" Attendu, sur le second point, que le même jugement a déclaré que, d'après l'analyse chimique, qu'il prend pour valable, le demandeur en garantie était justifiée ; que ce motif implicite répond aux conclusions d'appel ;

" Par ces motifs,

" Rejette, etc. (1)

" (M^{re} Rabinet, rapporteur)."

(J. J. B.)

AT ASSIZES—A SKETCH ON THE CIVIL SIDE.

Of all the pleasant places that are studded throughout England, commend us to the "ever faithful city," beautiful Worcester, as the model of an Assize town. With its vast cathedral, ancient even in the days when King John was laid to rest therein, its queenly river, its broad, grassy race-course, its old rookeries, its modern factories, it combines in an unusual degree the excellences of the past and the present, and when we add to these attractions, an abundance of good hotels and Assize courts, large and well ventilated, it may be easily understood why we are speeding our way down there this morning to attend Assize. Dirty Stafford is nearer to our own district, but there the calendar is always crowded, the courts are not fit to breathe in, and the hotels beneath contempt.

Arrived at Worcester, we find ourselves ahead of the judges, whose train is half an

(1) Voir *Cass.* 11 fv. 1880 (S. 80. 1. 164).

hour late, and, as nothing can be done till they arrive, we secure our quarters at the "Hop-pole," and stroll down to the cathedral, to which we know the judges will straightway proceed, both their lordships being true sons of the church, and sure to attend the Assize sermon. Half an hour quickly passes in the familiar aisles, and then we hear the blare of trumpets outside, the great doors swing slowly open, the organ peals out the National Anthem, and Her Majesty's judges, in all the pomp and ceremony of State, accompanied by the high sheriff and his crew, pass up the broad nave, enter their stalls in the choir, and morning service begins. After the Te Deum and the anthem we make our escape, having no mind to listen to the string of platitudes which some reverend and rusty canon is about to inflict on his unfortunate audience. We repair to the Shire Hall, and pass the time in badinage with our *confrères* already there, till at last the judges come from church, go on the bench and "open the commission," a mystic ceremony performed with much antique solemnity, and supposed to be essential to the validity of all the proceedings at the Assize. No sooner is the commission opened than the minor officials begin business and we are at liberty to enter our cases. After a little delay we get our cause favourably placed on the list, and we have next to deliver briefs. Mr. Matthews, Q.C., whom we have taken the precaution to retain two months ago, lodges as usual in the quiet abode of the widow Dunn (all hotels are, or were, at the time of which we are speaking, tabooed to the barristers on circuit), and there we deposit his bulky brief, with its little indorsement :

"Mr. Matthews, Q.C.....	50 guas.*
Consult'n.....	5 guas.
	—
	55 guas.

With you .

Mr. Dryasdust,
Mr. Pepperemwell."

The other briefs vary only in the lesser amount of the fees marked thereon, and are similarly left at the learned gentlemen's respective lodgings, and now we are free for the day. Mr. Matthews is expected down

* Guineas.

about six o'clock in the evening, and before the morning he will have to read perhaps a dozen briefs, one or two of which, like our own, may consist of 150 pages of closely written matter, and involve much analysis of dates and facts. To a stranger, the rapidity of apprehension, which the English system of instructing counsel at the last moment produces in the average barrister, seems almost incredible ; but there is an equally striking result flowing from the division of the profession into two branches which is not so obvious to outsiders, but must be well known to all, who, as solicitors, have had the task of preparing cases for trial, and have subsequently heard them tried. It is this—that very seldom indeed do counsel present and handle a case in the manner and from the point of view anticipated by the solicitor. The bringing a new mind to bear upon the case almost always results in the case being placed in a fresh light, in the discarding of a host of minor points, and in the battle being lost or won on the real hinges of the matter. The solicitor's careful mind has provided for every contingency, and prepared every detail, and had he to argue his case himself he would be far more prolix, and consequently less forcible than the barrister. This is, we think, the true advantage of the English dual system, and we are bound to say, after some experience of the American plan, that we still give the preference to the old way.

But we must not longer digress. Let us imagine the afternoon and night past, and the day of actual work arrived. Consultation is fixed for half past eight sharp at our leader's chambers, and there accordingly we go and meet Mr. M., and his two juniors. The keen hard lawyer receives us with dignified courtesy. He says little and the consultation does not last ten minutes, but we have had sufficient experience of counsel to know from the little he does say that he has read his brief, a thing by no means to be taken for granted. Mr. Pepperemwell, a pert little dandy with an eye-glass, evidently stayed too late at the county ball last night and has seen nothing of his brief, except the outside, but by the time the case is called he will have picked up enough to vigorously cross-examine one or two weak witnesses on the other side and this

is all we expect from him. As for Dryasdust a reliable thorough old lawyer, not showy, but true, he has previously drawn the pleadings, and advised on evidence and consequently knows the case almost as thoroughly as we do ourselves.

Entering the civil court, we find ourselves in a large square hall one side of which is occupied by the bench, whilst round the other walls are ranged rows of highbacked, uncomfortable pews, gradually descending as in a class room. The centre space or pit immediately beneath the judge is filled by a large baize covered table, round which sit the members of the bar in lively conversation, the sedateness of their wigs and the vivacity of their countenances forming as odd a contrast as their talk in which racing and law, politics and scandal jostle for predominance. As the judge's door opens, silence instantly obtains, and Manisty, J., a quiet slow old man, as yet blissfully ignorant of the Adams-Coleridge case, takes his seat and begins work. In those days Manisty was considered an exceptionally good lawyer, but weak in his appreciation of facts and wanting in capacity for business. In an appeal court he might have made a reputation—at *nisi prius* he was lost.

We need not recapitulate the various proceedings of an assize trial, which differs in little but its surroundings from an American trial by jury. There is more form and circumstance amongst the Englishmen, but there is also much more rapid despatch of business. Everybody is in a hurry, for the time allotted to the Assize is quite inadequate to the proper trial of the causes set down. Out of the sixteen on the list, probably seven or eight will be tried out, and, of the rest, some will be settled, others sent to a reference and two or three made *remnants* for Gloucester, at which city, being the last place in the circuit, the judges can sit indefinitely and clear off the arrears of the whole circuit. This, of course, applies only to the civil business. On the criminal side, the judge must make a complete jail delivery before leaving each town, no matter how long it takes him or how the other appointments of the circuit are deranged.

As our case is not reached on the first day

we have still to stay over, and, indeed, we are in no very great hurry to get away, for we are pleasantly lodged in an old-fashioned, homely hotel, and there is sure to be a race meeting, a county cricket match, or regatta or some kind of festival going on at Assize time, not to mention the minor attractions of the theatre, refreshingly provincial, or the glee club. This last institution deserves, at least, a passing notice. From time whereof the memory of man runneth not to the contrary, the singing men of the cathedral have been accustomed to meet in a tavern once a week and there sing glees and catches together. These meetings are now held in the large hall of an ancient inn and here on the usual night, the good burghers of Worcester are wont to assemble, smoking their long pipes, drinking their clear red ale or fragrant whiskey, and listening to those cheerful old madrigals and glees which are the most truly national music England can boast and which seem never to lose their charm. Long may the good old custom be kept up, not for the sake of gain, for not one copper do the singers receive, but as a living mark of that mild and tolerant feeling which is hereditary with the ecclesiastics of Worcester.

But the pleasantest holiday must end. On third and last day our case is reached, fairly well tried and a special verdict taken. The judge orders the legal points, which are intricate, to be argued before him in London after the circuit is closed, and suspends till then the entering up of judgment. This means more briefs, more fees and considerable delay, but, as our client happens to be a corporation, we do not feel that extreme disgust at the result, which our friend Jones, the solicitor on the other side, vigorously expresses. The judge may be, as he says, an old woman—he may even be right when he calls the barristers sharks, but our corns are not trodden on and why should we grumble? Anyway, the Assize is over and we have only to pay our reckoning at our inn and go home.

—A. B. M. in *Central Law Journal*.

A COUNTRY LAWYER ON LAW REFORM.

To the Editor of the *LEGAL NEWS*:

SIR,—I am what is called a country law-

yer, and of course have country cases in Review and in Appeal. Now, I have to complain of the present working of the system in both those courts of appellate jurisdiction. I have been in Montreal, from Aylmer, to get a hearing in the Court of Review as many as three times, and my case is still to be heard. In the Court of Queen's Bench it is worse. I have been there four times, and my case is still left to the future. This state of things is intolerable for country lawyers; of course city lawyers can attend to themselves.

Now, what is the remedy? The courts, perhaps, are not subject to reproach. It is the system. The Court of Review, which is only a bastard Court of Appeals, is composed of judges, chiefly of the city, who are crowded by work of original jurisdiction. They cannot do justice to the appellate work. The Court of Appeals is not strong enough in the number of judges to do the work pressing on the Court.

1st. Abolish the Court of Review altogether, and let the judges of the Superior Court do their work.

2nd. Double or treble the number of the judges of the Court of Appeals (Queen's Bench, Civil side), making the quorum four, so that two or three divisions may sit at the same time.

3rd. Let the judges of the Superior Court do the Criminal business, with an appeal to the Queen's Bench.

Why should the time of our judges in Appeal be wasted in running the ordinary Criminal Assizes? The Criminal Court must be presided over by a respectable man who knows some law, and who can guide the jury; but, after all, the matter rests with the jury, and the functions of the Judge are limited to questions of procedure and the admissibility of evidence. Superior Court judges do the work in rural districts, and if a Superior Court judge can hang a man in the country why cannot he do so in the town? All I want to enforce is a uniformity of system. There is no use weakening the Appeal Court by requiring one of its judges to do outside work. The Queen's Bench is an appeal court. Let it be an appeal court only, but let us have its work done, and done up to the handle all the time.

My proposition is to increase the number of judges. Some people will probably object on the ground of economy. What would be the annual expense to increase our present Queen's Bench to three times its present power by having six additional judges? Forty thousand dollars.

Who cares about the expense? The economy of an insufficient judiciary is an economy of candle-ends (*économie de bouts de chandelles*) worthy of nobody.

There is much bad blood made from the delays of the law. Lawyers are blamed, judges are blamed, and in the end they (lawyers and judges) are all set down as humbugs and swindlers, when all the time they are fretting and fuming, trying to get their work in, but cannot because the judging power is inadequate. It is utter nonsense to speak of the arrears of work in appeal, because it cannot be done. If six judges cannot do it, let us have a thousand. With faith you can move mountains; with numbers you can do so too, as witness our Canadian Pacific Railway. Let us have no arrears in legal work. Let people know they can have prompt remedy for their ills, and that lawyers can give relief. Now they are handicapped by the Court of Appeals, and it in its turn is overweighted in point of numerical force.

REFORM.

GENERAL NOTES.

One of the society journals has complained that the American chief justice was somewhat scurvily treated by the bench and profession when in this country. Undoubtedly American lawyers are far in advance of their English brethren in the matter of civilities to individuals. When members of their own body die, a funeral oration is almost inevitable, and in the spirit of a young republic, they are always glad to give cordial welcome to eminent strangers. It was hardly to be expected that Chief Justice Waite would meet with a reception in this country similar to that which was accorded Lord Coleridge in America. His name was probably unknown to most, and his presence in England was known only to a few. Lord Bramwell and other eminent men showed him every civility, and perhaps at another period of the year there would have been a combined recognition of his arrival, and a public tribute paid to the high office which he holds, and which has been filled by so many distinguished men.—*Law Times*, (London.)

The Legal News.

VOL. VIII. NOVEMBER 28, 1885. No. 48.

The hearing of cases during the November Appeal Term at Montreal proceeded somewhat slowly, and the list, which comprised 104 cases, was only diminished by 21 during ten days. Judgment was rendered in 23 cases, and the Court stands adjourned to December 30.

There is much consideration for political lawyers in England, for we see that many applications having been made to the Lord Chancellor for postponement of the hearing of House of Lords appeals, on the ground that many of the leading counsel retained to appear in them were absent on electioneering campaigns, his lordship decided that the hearing of these appeals should be adjourned until after the general election.

Lawyers have come to the front in the election campaign in unusual number. In all 193 offer themselves to the electors as candidates for seats in Parliament. Of these 180 are barristers and 13 are solicitors. Ninety-nine are of Liberal politics and ninety-three of Conservative politics, the rest professing neither faith. Eighteen lawyers announce their candidature in Middlesex, and twelve in Surrey, making thirty candidates for metropolitan constituencies. The number of lawyers in the field is about half as many again as in 1880.

Newspapers would do well to be careful in admitting to their columns the angry and one-sided effusions of disappointed suitors and counsel. A Quebec paper, for example, prints a letter purporting to come from Mr. Rattray, in which unwarrantable statements are made with reference to one of the Judges of the Court of Queen's Bench. The judgment will be found on page 10 of the present volume, and speaks for itself. It will be observed that it is the judgment of the majority of the Court, including the Chief Justice. The Supreme Court may or may not be right

in reforming that judgment; but assuming that the last decision is right, it does not seem to give Mr. Rattray much to boast of. After a silence of years, and after his employment had ceased, he made up a large account for services, of which the final judgment allows him about one-fourth.

SUPERIOR COURT—MONTREAL.*

Insurance (Fire)—Risk—Material concealment—Nullity.

Held:—That the concealment by the insured of the fact that the risk had been refused by another company, in consequence of two fires having occurred previously on the same premises under suspicious circumstances, is a material concealment, and renders the contract void.—*Minogue v. Quebec Fire Assurance Co.*, In Review, Johnson, Bourgeois, Gill, JJ., Oct. 31, 1885.

Sale—Refusal by purchaser to accept thing sold—Resale at purchaser's risk—C. C. 1554.

Held:—Where a person who purchased a bankrupt stock from the assignee, and made a payment on account of the price, subsequently refused to accept the goods, or to pay the balance of the price, on a pretence which he failed to prove; that the sale was dissolved, and that the vendor was entitled to resell the goods, after legal and customary notice, at the risk of the purchaser.—*Desmarais v. Picken*, In Review, Johnson, Plamondon, Bourgeois, JJ., Oct. 31, 1885.

Verdict—Libel—Damages—New trial—Procedure.

Held:—1. That the Court has no power to increase the award of damages by the jury.

2. In cases tried with a jury, it is the verdict of the jury, and not the opinion of the Court, which is to determine the amount of damages in actions for personal wrongs. This rule is peculiarly applicable in libel and slander suits. Insufficiency of damages is not, therefore, a proper ground for ordering a new trial in such cases, where it does not appear that the jury were improperly influenced or led into error.

3. Where the jury have given the plaintiff some damages (however insignificant), the defendant cannot move that judgment be

* To appear in full in Montreal Law Reports, 1 S. C.

entered for the plaintiff on such verdict.—*Dixon v. The Mail Printing Co.*, In Review, Johnson, Doherty, Gill, JJ., Oct. 31, 1885.

Pharmaceutical Association—48 Vict., ch. 36, s. 8—*Partnership contrary to law.*

HELD :—That section 8 of 48 Vict., ch. 36 (Q.), which says that all persons who, during five years before the coming into force of the Act, were practising as chemists and druggists in partnership with any other person so practising, are entitled to be registered as licentiates of pharmacy, does not apply to a certified apprentice under the Act of 1875 who had formed a partnership with his brother, a licensed druggist, and had carried on business in his brother's name from 1878 to 1885; that such contract of partnership, being in violation of the Act of 1875, was null and void, and the Act of 1885 did not legalize such partnership.—*Brunet v. L'Association Pharmaceutique de la Province de Québec*, In Review, Torrance, Gill, Loranger, JJ., (Gill, J. diss.) Oct. 31, 1885.

Judicatum solvi—*Motion*—*Délai.*

JUGÉ :—1o. Que lorsque le demandeur pendant l'instance laisse la province de Québec, le défendeur peut demander le cautionnement *judicatum solvi*, et que la motion pour l'obtenir peut être faite en tout temps, même après l'expiration des quatre jours qui suivent la connaissance qu'aurait eu le défendeur du départ du demandeur.

2. Que le délai de quatre jours pour demander le dit cautionnement ne s'applique que lorsque la demande est faite par exception dilatoire et non par motion.—*Cyr v. Bryson*, Mathieu, J., 19 septembre 1885.

Forclusion—*Exhibit*—*Permission de plaider*—*Frais*—*Preuve.*

JUGÉ :—Que lorsqu'un défendeur est forcé de plaider et laisse le demandeur procéder *ex parte* à sa preuve, sur le principe qu'un des exhibits de la demande n'est pas produit, il ne peut obtenir, dans le cas où cet exhibit n'est pas une pièce au soutien de la demande, mais qu'un état détaillé, la permission de plaider qu'en payant tous les frais encourus par son défaut, et la preuve faite pourra servir au demandeur.—*Lavallée v. Letourneur*, Taschereau, J., 16 octobre 1885.

Acte électoral fédéral—*Action qui tam*—*Affidavit.*

JUGÉ :—Que dans une action pénale intentée en vertu de l'Acte des élections fédérales, le demandeur doit produire préalablement un affidavit, comme dans une action *qui tam*, indiquant clairement les causes de la demande et énonçant la pénalité réclamée.—*Legris v. Cornellier*, Jetté, J., 22 septembre 1885.

Billets promissaires—*Exception dilatoire*—*Garantie*—*Endosseur.*

JUGÉ :—Que l'endosseur d'un billet promissaire poursuivi conjointement et solidairement avec le faiseur, ne peut opposer à l'action une exception dilatoire demandant qu'il ne soit tenu de plaider qu'après que le faiseur aura été par lui assigné en garantie et mis en demeure de plaider à l'action.—*Durocher v. Lapalme et al.*, Taschereau, J., 16 octobre 1885.

COUR DE CASSATION (FRANCE).

15 avril 1885.

M. BÉDARRIDES, *Président.*

JUIF et CHAMBARD.

Aveu—*Indivisibilité*—*Créance non contestée.*

JUGÉ :—Que les règles sur l'indivisibilité de l'aveu ne s'appliquent pas aux faits dont l'existence a toujours été reconnue par les parties.

Les faits sont suffisamment expliqués dans le jugement qui suit :

“ La Cour....

“ Sur le moyen unique du pourvoi tiré de la violation de l'art. 1356 C. civ. :

“ Attendu que les règles relatives à l'indivisibilité de l'aveu doivent être appliquées, non aux faits tenus pour constants par les deux parties, mais aux faits qui, méconnus par l'une d'elles, doivent être établis par celle à laquelle incombe le fardeau de la preuve ;

“ Attendu que Chambard ayant poursuivi Lazare Juif en paiement d'un solde de compte, celui-ci a formé une demande reconventionnelle ; que le litige, en dernier lieu, a porté uniquement sur une somme de 5,000 francs comprise dans la demande reconventionnelle, somme dont Lazare Juif se prétendait créancier et dont Chambard niait être débiteur ; que Lazare Juif a vainement essayé de prouver l'existence de cette créance ;

qu'il n'a pu l'établir ni par titres, ni par témoins, ni par présomptions; que l'arrêt attaqué constate que Lazare Juif et Chambard ont "toujours été accord" pour reconnaître que le compte actif de ce dernier devait s'élever à 1,490 fr., si les 5,000 fr. réclamés par Lazare Juif n'étaient pas admis;

"Attendu que si l'arrêt ajoute que, la demande de Lazare Juif étant écartée, il s'ensuit nécessairement que Chambard a justifié, "par l'aveu même de Lazare Juif," que ce dernier est son débiteur de 1,490 fr., cette expression n'implique pas que l'arrêt ait entendu puiser une preuve légale de cette dette dans un aveu judiciaire, une telle preuve n'étant pas nécessaire, puisque la dette était tenue pour constante par les deux parties; que l'arrêt ne relève pas, d'ailleurs, les circonstances et les termes dans lesquels Lazare Juif aurait fait en justice une déclaration constituant un aveu judiciaire, et que le pourvoi ne les précise pas davantage; que l'arrêt se fonde, pour accueillir la demande principale, sur ce qu'elle n'a jamais été contestée, et pour rejeter la demande reconventionnelle, sur ce qu'elle n'est pas prouvée; qu'en statuant ainsi, la Cour d'appel n'a pas basé décision sur la foi due à l'aveu judiciaire et n'a donc pu violer les règles de l'art. 1356 du Code civil;

"Rejette, etc." (1)

(M^{re} G. Lémaire, rapporteur).

(J. J. B.)

QUEEN'S BENCH DIVISION, (ENGLAND)

Oct. 29 and Oct. 30, 1885.

REGINA V. DE PORTUGAL.

Extradition—Fugitive Criminal—Fraudulent Misappropriation of Securities—Agent—Larceny Act, 1861.

The Solicitor-General (R. S. Wright and Danckwerts with him) showed cause against a rule nisi obtained by J. M. A. de Portugal, a prisoner awaiting his extradition to France, for his discharge from the Clerkenwell House of Detention, on the ground that he had committed no offence known to the law of England within section 10 of 33 & 34 Vict. c. 52.

The prisoner was entitled under a written

agreement to receive a large sum of money if he succeeded in obtaining a certain contract in France for the prosecutor. In the course of the negotiations for such contract the prisoner was entrusted with a cheque and a bill of exchange. The prosecutor alleged that he had given him express verbal orders to open an account at one of two banks with the cheque, and written instructions as to the bill of exchange. The prisoner, however, misappropriated the greater part of the proceeds of the one and the whole of the proceeds of the other. Criminal proceedings having been taken against him in Paris for fraud and false pretences he escaped to this country, and was arrested under the Extradition Act.

He was committed on a warrant charging him with an offence in the terms of section 75 of the Larceny Act, 1861 (which apply to a banker, merchant, broker, attorney, or other agent.)

Tickell, in support of the rule, contended that prisoner was not an agent within this section, that the securities had not been entrusted to him within the meaning of the second part of it, and that he (the prisoner) had had no authority to transfer them within the meaning of it.

The COURT (MATHEW, J., and SMITH, J.) held that 'other agent' meant a person entrusted with money in a personal capacity and *ejusdem generis* with banker, broker, &c., and that prisoner was not an agent within section 75.

Rule absolute.

THE LIQUOR LICENSE QUESTION BEFORE THE PRIVY COUNCIL.

The argument in the matter of the validity of the Liquor License Act, 1883, and the act amending the same, and the petition of the Marquis of Lansdowne, Governor-General of the Dominion of Canada, was heard on the 11th instant, before the Lord Chancellor, Lord Fitzgerald, Lord Monkswell, Lord Hobhouse, Sir Barnes Peacock, Sir Montague Smith, and Sir Richard Couch. This was a matter which, under the provisions of an Act of the Dominion of Canada (47 Vic. c. 32), had been, on the petition of the Governor-General of Canada, referred to the Judicial Committee in order to obtain a decision whether two Acts of the Dominion—namely, the Liquor License

(1) Voir dans le même sens : *Douai*, 13 mai 1886 (S. 36. 2. 450); *Larombière*, *Obligations*, art. 1356, No. 18; *Aubry & Rau*, t. VIII, § 751, note 30.—(J. J. B.)

Act, 1883 (46 Vic., c. 30), and the amending Act (47 Vic., c. 32)—were or were not, in whole or in part, valid.

Sir Farrer Herschell, Q. C., the *Hon. G. Burdidge, Q. C.*, (the Deputy Minister of Justice of Canada), and *Mr. Jeme*, were counsel for the Dominion of Canada; for the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, there appeared, *Mr. Horace Davey, Q. C.*, and *Mr. Haldane*, with whom were the *Hon. Mr. Church, Q. C.*, for the Province of Quebec, the *Hon. M. W. Tyrwhitt Drake, Q. C.*, for British Columbia, and the *Hon. Mr. Fraser, Q. C.*, for the Province of Ontario.

In the year 1878 the Dominion of Canada passed the Canada Temperance Act, which Act was in the case of *Russell v. the Queen*, on appeal to Her Majesty in Council, held to be within the legislative power of the Dominion of Canada to enact. The Liquor License Act, 1883, was an Act for establishing a system of licenses for the sale, both wholesale and retail, of intoxicating liquors within the Dominion of Canada. The preamble of the Act sets forth that it was desirable to regulate the traffic in the sale of intoxicating liquors, and it was expedient that the law respecting the same should be uniform throughout the Dominion, and that provision should be made in regard thereto for the better preservation of peace and order. By the 26th section of the Act to amend the Liquor License Act the following provision was made:—"Whereas doubts have arisen as to the power of Parliament to pass the Liquor License Act, 1883, and the amendments thereof contained in this Act,—it is therefore enacted that until the question of the competence of the Parliament of Canada to pass the said Act and this Act be determined, as hereafter provided, no prosecution for the infringement or violation of the said Liquor License Acts shall be instituted against any holder of a license for selling liquor granted to him under the authority of any statute passed by any of the provinces, so long as such license under such authority is in force." It was also provided that, for the purpose of having the question determined as soon as possible, the Governor-in-Council might refer to the Supreme Court of Canada for hearing and determination the question as to the

competence of Parliament to pass the acts in question, in whole or in part, and that the Court should hear and determine the same and certify their opinion to the Governor-in-Council; and if, in their opinion, a part or parts of the acts only were within the competence of the Parliament, then they should certify to the Governor-in-Council what part or parts were within such competence. It was further provided that the Lieutenant-Governor of any of the provinces might, with the consent of the Governor-in-Council, on behalf of the province of which he is the Lieutenant-Governor, become a party to the case, and in the event of any province becoming a party, it should be entitled to be heard by counsel on the argument. The case laid before the Supreme Court of Canada consisted of a reference to the acts and of the question, "If the Court is of opinion that a part or parts only of the said acts are within the legislative authority of the Parliament of Canada, what part or parts of the said acts are so within such legislative authority?" The provinces of Ontario, Quebec, New Brunswick, British Columbia, and Nova Scotia became parties to the case, which came on for hearing on September 23, 1884, before the Supreme Court of Canada, constituted by Chief Justice Sir William Ritchie and Justices Strong, Fournier, Henry, and Gwynne. The decision of the Supreme Court was given on January 12, 1885, and was to the effect that both the acts in question were *ultra vires* of the legislative authority of the Parliament of Canada, except so far as these acts respectively purported to legislate respecting the licenses mentioned in section 7 of the Liquor License Act, which were called vessel licenses and wholesale licenses, and except, also, so far as the act respectively related to the carrying into effect of the provisions of the Canada Temperance Act, 1878. Mr. Justice Henry was of opinion that the acts were *ultra vires* in whole. Subsequently the Governor-General petitioned Her Majesty in council to refer the matter to the Judicial committee of the Privy Council to report thereon to Her Majesty, and the case consequently came on for hearing before their Lordships.

Sir Farrer Herschell argued the case for the

Dominion of Canada, and submitted that the acts were within the legislative power of the Dominion Parliament. He contended that on the true construction of the British North America Act, 1867, more especially sections 91 and 92, the provisions of the acts in question were within the legislative powers of the Parliament of Canada. He argued that it was perfectly within the legislative powers of the Parliament of the Dominion of Canada to pass acts for the regulation of a particular trade, having for their object the peace, order and good government of the country, and that such acts would apply to the whole Dominion. The provisions of the acts in question regulating the liquor traffic, it was submitted, fell within the class of subjects comprised within the designation, "The regulation of trade and commerce," and the designation "laws respecting the peace, order and good government of Canada," or one or other of such designations in the British North America Act, 1867. Moreover, it was argued, power was not given by the British North America Act to the provincial legislatures to enact such provisions as were contained in the acts in question. Further, it was contended that the reasons given in a judgment of the Judicial committee in the case of "Russell and the Queen," applied to the present case, and also that to hold that the provisions of the acts in question, were *ultra vires* of the Parliament of Canada would be incompatible with the decisions given in cases on appeal to Her Majesty in council from Canada, and with the judgments of the judicial committee in such cases.

Sir Farrer Herschell's argument lasted all day, and at its end their lordships adjourned.

Nov. 12, 1885.

The hearing of this case was resumed this morning. This was a matter which, under the provisions of an act of the Dominion of Canada (47 Vict., chap. 32), had been on the petition of the Marquis of Lansdowne, Governor-General of the Dominion of Canada, referred to the Judicial Committee of the Privy Council, in order to obtain a decision whether two acts of the Dominion, namely the Liquor License Act, 1883, (46 Vict. cap. 30), and the

amending act (47 Vict. chap. 32), were or were not in whole or in part valid.

The question was whether the two acts were or were not in whole or in part valid as being within the legislative power of the Dominion Parliament. The circumstances in which the question came to be referred to the Judicial Committee of the Privy Council for decision are published above.

Mr. *Burbridge, Q.C.*, said he had nothing to add to the argument of Sir Farrer Herschell on behalf of the case for the Dominion.

Mr. *Horace Davey* argued the case on the part of the different provinces, and submitted that the act in question was altogether *ultra vires*; and while he supported the opinion of the Court below, he contended that the act was also *ultra vires* in points which they held were within the power of the Dominion Parliament—namely, as to vessel licenses and wholesale licenses. The whole question turned on the construction of the 91st and 92nd sections of the British North America Act. The 91st section gave power to the Queen to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provinces. If he could show that the act in question was among the classes of subjects assigned exclusively to legislatures of provinces—that was to say, if it came within section 92 of the British North America Act—then the Dominion Parliament could not, under its general authority to make laws for the peace, order and good government of Canada, make a law in respect to that matter. He submitted that the enumerated matters in sec. 91 were subject to the words "matters not coming within the classes of subjects assigned exclusively to the provinces." These classified subjects were inserted for greater certainty and governed the whole of the section. For example, they might make regulations as to trade and commerce, but such regulations must not infringe upon the exclusive power of legislation over matters mentioned in section 92, and regulations made under section 91 must be such as would not interfere with the exclusive jurisdiction given to the legislatures of the provinces. The learned counsel, in a lengthy argument (in the

course of which he cited the case of "Hodge and the Queen"), submitted that the acts in question were *ultra vires in toto*, because their provisions related either exclusively to matters of a local nature, exclusively to property and civil rights, or exclusively to municipal institutions in the above-mentioned provinces. He also argued that the provisions of the acts related entirely to matters falling within sec. 92 and not within sec. 91 of the British North America Act, and that for these and other reasons the acts in question were not within the legislative power of the Parliament of Canada to enact.

Mr. Haldane followed upon the same side, and drew their lordships' attention to decisions in different cases, which he contended materially supported the contention on the part of the provinces.

Sir Farrer Herschell, in reply, contended that because a law operated locally and its benefits were felt locally, it did not show that it was an act merely of a local nature. Because power was given to municipal institutions to make regulations it did not prevent the Dominion Parliament having the power to legislate for the whole country. The real test was whether it was a Dominion purpose. It was competent for the Dominion Parliament to make laws for the general welfare of the country, notwithstanding that municipal institutions had the power to make certain regulations. It was competent for the Dominion Parliament to make regulations in respect of trade and commerce for the peace, order and good government of Canada. The learned counsel cited the case of "Russell and The Queen" in support of his arguments, and submitted that the acts in question were within the legislative power of the Dominion Parliament, and that the true construction of the North America Act, especially of sections 91 and 92, showed that the acts in question were within the legislative power of the Dominion Parliament as regulating a particular traffic, the object being for the peace, order and good government of Canada.

At the conclusion of the arguments, the Lord Chancellor intimated that their lordships would consider the matter, and would report thereon to Her Majesty.

THE DOMICILE OF HOMELESS BACHELORS.

In the case of *Patience v. Main*, 54 Law J. Rep. Chanc. 897, reported in the November number of the *Law Journal Reports*, Mr. Justice Chitty had to decide a question of domicile in a case of great difficulty and interest. In October, 1882, there died at a private hotel in Charlotte Street, Fitzroy Square, London, a gentleman named James Patience. He was a person of very retiring disposition, who had no friends. He was deaf, and never went into society. In his room was found an envelope on which was endorsed the words in his handwriting: 'The enclosed two letters are from my late brother, the Rev. J. Patience, minister of the parish of Ardnamurchan, N.B. He died, I think, in the year 1827. I had then living a sister named Catherine, married to a Mr. Fletcher, who occupied a farm near Tobermory, in the Isle of Mull. She died, I am informed, in 1854, and left a numerous family of sons and daughters. I have had no communication with any of my relations for many, many years, and I must accuse myself of this long silence.' The indorsement was dated August, 1860, and although he appears at that time to have had twinges of conscience in regard to his seclusion from his relatives, he does not seem to have taken any step to reveal himself between that date and twenty-two years later, when he died. At all events, he left no will, and his relations, who were all Scottish, claimed to have his property distributed according to the Scotch law of Distributions, which is more liberal in including the descendants of collaterals than the English statute. This question depended on the domicile of the dead man. He was entitled to the rank of colonel in the Queen's army, but his army agent did not know that he was Scotch by birth. It turned out, however, that this was the fact. He was born in 1792 in Ross-shire. In 1810 he obtained his commission, and went with his regiment to the West Indies. From that time to 1860 he was employed in various parts of the world, but mainly abroad, and at the latter date he sold out. After selling out, he lived in England all the rest of his days, a homeless bachelor, going from London to Margate, and thence to Folkestone, Hastings, and other places, taking up

his abode in boarding-houses, hotels, or lodgings. The only evidence that his eyes ever reverted to Scotland, his place of birth, was contained on the envelope referred to.

Out of this colorless biography, the law had to construct a domicile, and it is not to be wondered at, in the case of a man whose local habitation had been constantly shifting, and who never seemed to prefer one place to another, but to be indifferent to all, that the law should fall back upon presumption. This Mr. Justice Chitty has done, holding that his domicile was Scotch, because he was born there, notwithstanding the fact that when he had once left that country he had never put foot in it again. In arriving at this conclusion the learned judge passes in review such meagre authority as there is on the subject. As he had spent eighteen of the first years of his life in Scotland, so he had spent twenty-two of the last years of his life in England. The interval could be said to present no possible local preference, so that the choice lay between these two domiciles. The learned judge following Lord Cairns in the Scotch appeal of *Bell v. Kennedy*, L. R., 1 H. L. Sc. 307, lays down that, in order to overcome the presumption, he must have made his home in England 'with the intention of establishing himself there and ending his days in that country.' We doubt whether many men ever consciously form the resolution to end their days anywhere in particular: but Lord Cairns' words express with sufficient accuracy the weight of proof necessary to establish a change of the domicile of origin. Could it be inferred from the character of his residence in England that he had cut himself off from Scotland altogether. Mr. Justice Chitty cites Lord Cranworth in *Whicker v. Hume*, 28 Law J. Rep. Chanc. 396, as showing that the fact of a man 'lying,' as he expresses it, 'at single anchor' in lodgings only is a circumstance in arriving at a conclusion, but not conclusive against a new domicile. Lord Cranworth instances the cases of men who live all their lives in the Inns of Court. In the Scotch case of *Arnott v. Groom* it was said that 'a life so unsettled argued that sort of fluctuation of mind' which was insufficient to destroy the domicile of origin. The difficulty about this view is that few people have

any mind at all about their domicile. It is the last thing they think about. Lord Jeffrey, on the other hand, would not admit that it was necessary to have some particular spot or some fixed establishment to constitute a new domicile. Moreover, in *Doucet v. Geoghegan*, L. R. 9 Chanc. Div. 441, the late Master of the Rolls approved of the view of Dr. Lushington, that length of residence raises the presumption of intention to acquire domicile, and that this presumption was not rebutted by an expression of intention or anything short of actual removal. Several other cases were referred to, in which it was laid down that residence is a very different thing from domicile, but that from it may be inferred intention. The conclusion at which Mr. Justice Chitty arrived was that the residence in England 'showed a fluctuating and unsettled mind, and that the fact of residence alone, although for twenty-two years, without any other circumstance to show the intention, is insufficient to warrant me in coming to the conclusion that Colonel Patience intended to make England his home.' He accordingly decided in favor of the Scotch domicile.

That part of the judgment of the learned judge which is most open to criticism is where he says that there were no other circumstances to show intention except the residence. There was one circumstance which the learned judge does not refer to, but which it seems to us is a necessary element in the case, even if not conclusive of the question. When Colonel Patience returned from 'wandering on a foreign strand,' where did he go? Not to Scotland, but to England. Perhaps in his person was answered the poet's question whether there lives

a man with soul so dead,
Who never to himself hath said,
This is my own, my native land?

He was, at all events, dead to the attractions of Scotland, a land which is very far from being generally supposed to repel her sons. Not only did he not return to the arms of his native country, but he studiously avoided it for twenty-two years, although he was perfectly aware all the time that in distant Tobermory he had many nephews and nieces, the children of his sister, Catherine. Mr. Justice Chitty appears to be right in laying down

that residence alone, even for twenty-two years, will not destroy the domicile of origin; but we venture to doubt whether he is right in deciding that a man who for fifty years has wandered over the world, and returns not to his native land, but to another country, where he remains till his death, does not show an intention of abandoning his domicile of birth and taking a domicile of adoption.—*Law Journal* (London).

GENERAL NOTES.

At the Liverpool County Court there was a dispute with a dressmaker about the fit of a certain bodice. The plaintiff, who refused to take it, alleged it was too short, and too much padded. The dressmaker stated that bodices were now cut short on the hips, and as to the padding it was necessary, on account of the lady being deficient in the place where the padding was placed. The plaintiff did not desire to have her figure improved by the dressmaker, she was quite satisfied with it as it was. The question of misfit or fit appeared to be incapable of decision, till at length the dressmaker claimed that it should be put on. The plaintiff at length consented to do so, and adjourned for that purpose. On her return the judge and Court proceeded to criticize the fit. The judge at last made a suggestion—such a suggestion, just like a man—that surely the fault of the bodice being too short might be remedied by bringing the dress higher up: but then his honor appears to have forgotten all about the ankles. The matter was, however, at last settled.—*Gibson's Law Notes* (London).

In the Hoyt will case, Gen. Butler, while addressing the Surrogate in opposition to a motion to strike out certain medical testimony, provoked a laugh at the expense of Senator Evarts, his adversary. "Why, your Honor," said he, "at this time the testator's malady had proceeded so far that his mind was almost entirely gone. He could not carry on an intelligent conversation. He could not even talk politics; and no one knows better than my learned friend, (turning to Senator Evarts) that it takes very little intellect to talk politics."

At a trial over which Mr. Justice Maule presided, great doubt was expressed as to whether a little girl who had been called as a witness knew the nature of an oath. To silence controversy, the judge asked the child if she knew where she would go if she told a lie. The witness meekly replied, "No, sir." To which the judge added, "A very sensible answer. Neither do I know where you will go to. You may swear the witness."—*Whitehall Review*, (London.)

Houghton, with all his high gifts, had, like most really noble men, a good deal of the woman in his nature, not only of the gentle, the merciful woman, but also of the woman excelling man by her ready initiative, by her swift sagacity transcendent of the reasoning process, and now and then by her nimble, her

clever resort to a charming little bit of stage artifice. My landress had come to me one day in floods of tears because her little boy of eleven years old, but looking, she said, much younger (being small of stature), had wandered off with another little boy of about the same age to a common near London, where they found an old mare grazing. The urchins put a handkerchief in the mouth of the mare to serve for a bridle, got both of them on her back, and triumphantly rode her off, but were committed to Newgate for horse-stealing! My landress (not wanting in means) took measures for having her child duly defended by counsel, but I thought it cruel that the fate of the poor little boy should be resting on the chances of a solemn trial, and I mentioned the matter to Milnes [Lord Houghton]. He instantly gave the right counsel. "Tell your landress to take care that at the trial both the little boys—both, mind—shall appear in nice clean pinafores." The effect, as my landress described it to me, was like magic. The two little boys in their nice 'pinafores' appeared in the dock and smilingly gazed round the court. "What is the meaning of this?" said the judge, who had read the depositions and now saw the 'pinafores.' "A case of horse-stealing, my lord." Stuff and nonsense!" said the judge with indignation. "Horse-stealing, indeed! The boys stole a ride." Then the 'pinafores' so sagaciously suggested by Milnes had almost an ovation in court, and all who had to do with the prosecution were made to suffer by the judge's indignant comment.—*Fortnightly Review*.

PRISONERS AS WITNESSES.—In the course of summing up in *Regina v. Jarrett*, on November 7, Mr. Justice Lopes made the following observations:—"All the parties who are accused, except Jacques, have availed themselves of the privilege of giving evidence. I rejoice that they have done so, because it has enabled them to place before you every fact and every circumstance which could in any way exonerate them from the offence with which they are charged. I cannot help alluding to the fact that the Attorney-General has refrained from objecting to evidence which, if objected to, I think I must have held inadmissible. Statements made by one of the accused parties to the other have frequently been introduced into this case. No objection was taken to that course, and I did not feel it my duty to interfere. I am glad no objection was made, because it gave a greater opportunity to the accused. I allude to these matters for this reason: that this being one of the first cases tried under the new Act, I should not like what has been done in this case to be construed into a precedent, and that it should be supposed that in cases tried under this Act, when persons tender themselves as witnesses, statements of this kind are to be allowed. Jacques might have been put into the witness-box, but Mr. Mathews, with great judgment, said that no observation adverse to him had been made, because he was ready to admit all the evidence given, and had nothing to contradict, and why, therefore, should he go into the box if he had nothing to contradict? As Jacques has not chosen to go into the witness-box, it is not a fair suggestion to say if he had gone into the box there might have been extracted from him that which would have implicated him."

The Legal News.

VOL. VIII. DECEMBER 5, 1885. No. 49.

MUNN & BERGER ET AL.

After an unexplained reticence of nearly two years and a half, we have a report of the decision of the Supreme Court in this case (10 S. C. R. 524). Those present at the judgment circulated contradictory accounts as to what the decision implied. One rumor conveyed the idea that the judgment only affirmed that the evidence had been stopped prematurely, while another was that a contract might be maintained on verbal evidence of a verbal acceptance. All reasonable doubt on the subject is now cleared away. The head-note of the reporter lacks precision, but it was unequivocally held—that an action upon any contract for the sale of goods, where there is no writing signed by the party (i.e. the party to be bound), may be maintained, without *commencement de preuve par écrit*, by verbal evidence of an acceptance by words only.

Four of the five judges, who have thus reversed the decisions of two Courts, and of six judges of the province of Quebec, in delivering judgment spoke; and although there are little inexactitudes of expression which might justify acerb criticism, it is impossible to read their opinions, and with candour state their holding otherwise than we have done. The concluding words of Chief Justice Ritchie, "we cannot anticipate what the answers would have been, or whether they would have sustained plaintiff's contention," and the concluding observation of Mr. Justice Gwynne, explain the contradictory accounts we heard of the ruling, but it would be idle to contend that these reservations affect the issue decided by the Court. To all intents and purposes it is laid down as law that acceptance in its narrowest signification, that is, as being part of the contract, can be proved without writing, although the whole contract cannot be so proved. The disposition of the 4th sub-section of article 1235, C. C., is therefore declared to be inoperative.

It is not unlikely that the hierarchical au-

thority of the five will ultimately give way to the authority of reason of the greater number.

In the meantime let the Messrs. Berger console themselves with the reflection that they are (perhaps in a small way—we are not all born to greatness), martyrs to science. Their case has served to elucidate a difficulty exaggerated if not entirely created by the code, and to illustrate the legal acumen of the Supreme Court.

R.

SUPERIOR COURT.

ST. JOHN'S, Dist. of Iberville,
November 2, 1885.

Before CHAGNON, J.

GADOUA et al. v. Rev. A. P. TASSÉ.

Jurisdiction—District—Order issued by Judge in another district—Pleading—Costs.

- Held:**—1. *That an order in a case pending in one district of the Province, can only be legally made by the Judge resident in that district, or by a Judge acting as substitute for the resident Judge and exercising his functions in the said district. An order made outside the district by a Judge exercising his functions in a district other than that in which the cause is pending is irregular and illegal.*
2. *That such illegality may be invoked by exception to the form.*
3. *Where before the exception to the form has been disposed of, the parties by consent have proceeded to the merits, the Court, in dismissing the action upon the exception, will order each party to bear his own costs of the contestation on the merits.*

PER CURIAM. Il s'agit d'un bref de Mandamus à l'effet de forcer Messire Tassé, curé de la paroisse de St. Cyprien de Napierville, de convoquer une assemblée des marguilliers anciens et nouveaux, et des paroissiens et franc-tenanciers de la dite paroisse, pour prendre en considération la question de l'opportunité de se servir pour l'agrandissement du vieux cimetière d'une partie de terrain y attenante, aujourd'hui occupée par le défendeur, et aussi pour prendre en considération généralement l'usage qui devrait être fait de cette partie de terrain, afin d'empêcher qu'il ne retournât à celui qui en avait fait la con-

cession, aux termes de l'acte de concession produit.

Cette action et requête libellée a été prise devant le Juge en Chambre, tel que la chose était permise en vertu des arts. 1022 et suivants du Code de Procédure. Cette action a été rencontrée d'abord par une exception à la forme et ensuite par une défense au fond.

L'exception à la forme s'attaque à l'ordre donné à Montréal, par M. le Juge Mathieu, et demande que la procédure en rapport avec le dit ordre soit déclarée irrégulière et illégale, parce que Son Honneur le Juge Mathieu n'était point lors de la souscription du dit ordre, le Juge résidant dans le district d'Iberville où le bref a émané, et parce que le Juge résidant dans ce dernier district avait seul le droit et pouvoir de donner le dit ordre s'il y avait lieu.

Cette question est importante, car elle implique le droit des juges de la Cour Supérieure de s'immiscer, d'un endroit quelconque dans la Province, dans les affaires des districts judiciaires qui ne leur ont point été assignés.

Nul doute que la juridiction des juges de la Cour Supérieure s'étend à toute la Province de Québec, et à ce point de vue est illimitée, mais cette juridiction, quoiqu'illimitée dans son principe, ne doit-elle pas subir les dispositions de la loi, relatives à la création des différents districts judiciaires et à l'administration de la justice dans ces divers districts ?

La législation a pourvu à ce que les parties litigantes n'auraient pas le choix des districts où elles voudraient intenter leurs procédures, mais elle a émis certaines règles dont l'effet est de forcer l'introduction des instances dans les uns ou les autres de ces districts. Et aux fins d'administrer la justice dans chacun de ces districts la législature a voulu que les juges, y compris le Juge en Chef, exerceraient leurs fonctions judiciaires dans le ou les districts qui leur seraient prescrits et assignés respectivement à cette fin, de temps à autre, par le gouverneur. Voir Stat. Ref. B.G., ch. 78, sect. 1.

La commission des juges ne déclare pas seulement qu'ils devront résider au chef lieu du district ou de l'un des districts qui leur auront été assignés, mais elle déclare aussi qu'ils sont chargés d'administrer la justice dans ces districts.

Ainsi, la commission du juge siégeant dans le district d'Iberville, dit: "And we do hereby assign to you... as such judge, the judicial district of Iberville, in the said Province of Quebec, within which you shall, from and after the date hereof during our pleasure, in general discharge the duties of your said office."

La loi pourvoit ensuite au cas où le juge, à qui un district a été ainsi assigné, deviendrait récusable ou serait partie lui-même dans la poursuite intentée, et déclare que dans ces cas la poursuite sera instruite dans un district voisin. Voir s. 20 du même chap. St. Ref. B.C.

La section 24 du même chapitre dit que chaque fois que le juge résidant dans un district sera absent du lieu où se tient la Cour Supérieure, ou sera incapable pour cause de maladie, de remplir ses devoirs..., le protonotaire de la Cour Supérieure remplira tous les devoirs que le juge résident peut suivant la loi remplir hors de terme.

La s. 25 du même statut dit aussi qu'en l'absence de tout juge de la Cour Supérieure du chef-lieu d'un district durant la vacance, le protonotaire de la dite Cour dans ce district pourra faire et exercer au chef-lieu, tout acte ou fonction ministérielle ou judiciaire que tout juge de la dite Cour pourrait faire et exercer pendant la vacance, dans le cas de nécessité évidente, et lorsqu'à raison du délai apporté à faire ou exercer tel acte ou fonction, un droit pourrait autrement se perdre ou être compromis.

Notre Code de Procédure répète à peu près mot pour mot les mêmes dispositions.

Ainsi l'art. 42 de ce Code dit: "Si le juge chargé seul d'administrer la justice dans un district, est récusable ou partie, l'action peut être portée dans un des districts voisins."

L'art. 465 du même Code répète aussi qu'en l'absence du juge du chef-lieu de tout district durant la vacance, le protonotaire en remplit les fonctions dans les cas de nécessité évidente.

Il ressort donc, suivant moi, de toutes ces dispositions législatives, que c'est dans le district où la procédure doit s'instituer que tous ordres et ordonnances en rapport avec cette procédure, doivent être sollicitées et accordées, et qu'en général, comme le dit la com-

mission des juges, ou *d'ordinaire*, comme le dit le statut, c'est le juge à qui le district a été assigné, ou le protonotaire à son défaut, dans des cas de nécessité évidente, qui doit donner de tels ordres.

Le statut, aussi bien que la commission des juges, se servent certainement d'expressions fort justes quand ils disent que c'est le juge à qui le district a été assigné qui doit *d'ordinaire* ou *en général*, exercer les fonctions professionnelles dans ce district, car il peut arriver des éventualités, ou accidentellement, un autre juge peut être appelé à remplacer le premier; mais le juge remplaçant doit alors exercer ses fonctions dans les conditions dans lesquelles le premier juge était tenu de les exercer lui-même.

Le juge remplaçant se trouve, dans cette éventualité, substitué au premier, et c'est alors le cas de l'application de sa juridiction illimitée dans toute la Province de Québec, mais il doit pour exercer ses fonctions au lieu et place du premier, se transporter dans le district où cette procédure est pendante ou dans lequel doit s'intenter cette procédure. La seulement sa juridiction illimitée le rend maître du litige et lui permet de donner les ordres ou de promulguer les ordonnances qu'il appartient. La juridiction illimitée du juge, ne peut lui permettre d'ignorer l'organisation judiciaire faite dans la Province. Cette organisation étant l'objet de textes de loi positifs, il doit exercer sa juridiction en rapport avec cette organisation. Il peut parcourir tous les districts de la Province et y exercer ses fonctions, mais il ne peut, du district qui lui a été assigné, promulguer des ordres applicables à une instance pendante ou devant être portée dans un autre district.

L'article 1023 du Code de Procédure, relatif à l'émanation du bref de *mandamus* dit: " Cette demande est faite par une requête libellée appuyée de dépositions sous serment exposant les circonstances de l'affaire, et est présentée au tribunal ou au juge qui peuvent alors ordonner qu'un bref de *mandamus* émane."

Dans le cas actuel on ne s'est pas présenté devant le tribunal mais devant un juge en chambre; et c'est à Montréal, dans le district de Montréal, que l'on s'est adressé pour ob-

tenir d'un juge résidant et exerçant ses fonctions dans ce district, l'ordre reproché.

La demande de cet ordre constituait le commencement de l'instance du *Mandamus*, et de même que tous les ordres subséquents dans la même affaire devaient être rendus et prononcés dans le district où la procédure était prise, savoir dans le district d'Iberville; de même l'ordonnance génératrice de cette instance devait être sollicitée et rendue dans le district où la procédure devait initier.

On prétend que l'art. 5 du Code de Procédure explique ce que signifie le mot *juge* partout où il est employé dans le code, et que ce mot s'applique au "juge en chef" comme à tout juge suppléant du même tribunal. Fort bien! mais cet article ne dit pas que le juge en chef comme tout juge suppléant pour donner des ordres dans des instances dépendant du district judiciaire d'Iberville, ne devront pas se transporter dans le district d'Iberville.

Il me semble que si une partie qui voudrait faire originer une procédure dans un district, pouvait sur le refus du juge du district, de permettre la procédure, parcourir tous les districts de la province pour y trouver un juge disposé à lui donner l'ordre sollicité et faire émaner cet ordre *ex parte* d'un district quelconque, dans la province, ce serait saper à sa base toute notre organisation judiciaire, tous les principes sur lesquels repose la décentralisation en rapport avec l'administration de la justice en cette province.

Il me semble que la seule voie possible dans le cas de refus de la part du juge du district d'accorder une demande en chambre, serait, attendu notre organisation judiciaire, de renouveler la demande dans le district devant un autre juge.

J'ajoute qu'il peut arriver que dans ces sortes d'instances, le juge à qui on s'adresse, usant d'une discrétion que la loi lui accorde en pareil cas, ordonne, avant de donner son ordre, que la demande soit signifiée à la partie adverse, aux fins de l'entendre, avant que l'ordre ne soit émis. Cette discrétion est nommément accordée au juge par le statut relatif aux brefs d'injonction; — 41 Vict., ch. 14.

Et cette discrétion est permise par la loi

dans tous les cas de brefs de cette nature, et est plus d'une fois exercée spécialement dans le cas de bref de prohibition. Or, devrait-on dire que dans ces cas, comme dans d'autres analogues, notre organisation en districts judiciaires, pourrait permettre à un juge d'un district étranger d'ordonner la comparution devant lui, en dehors du district, de parties qui à cet égard ne sont pas ses justiciables, pour discuter une demande en rapport avec une instance mue ou à être mue dans un autre district.

Et dans le cas d'une demande de possession faite par l'une des parties à une saisie-revendication, de l'objet revendiqué, le juge en dehors du district où doit s'instruire l'instance en revendication, pourrait-il également forcer la comparution devant lui des parties, demandeur et défendeur, pour entendre leurs raisons relativement à cette demande de possession, aux fins d'adjuger si ce sera le demandeur qui devra obtenir la possession ou si ce sera le défendeur, qui faisant demande contraire, devra garder cette possession en donnant le cautionnement fixé ?

La même chose devrait-elle se faire dans le cas d'ordre à donner, relative à l'émanation du bref de *capias* pour dommages et intérêts non liquidés ? *Et quid du séquestre ?*

Il me semble que la loi ne pourrait aller à supporter une pareille dérogation au principe des assignations de parties devant les tribunaux de chaque district, siégeant en terme comme hors de terme.

Dans une cause de *Garon v. Lamontagne*, décidée à Québec, en mai dernier, par la Cour d'Appel (voir 8 Legal News, p. 194), les honorables juges Ramsay et Baby ont été d'avis, qu'en effet le juge exerçant ses fonctions dans un district n'avait pas le pouvoir ni la juridiction de donner dans son district des ordres affectant des instances mues ou à être mues dans un autre district, et en se basant sur cette opinion, ils ont différé de la majorité de la cour quant à la question des frais.

Le jugement de la majorité de la cour n'a pas d'ailleurs déclaré qu'un juge, dans les conditions ci-dessus, avait le droit de donner de tels ordres, mais a seulement décidé qu'un pareil ordre n'était pas *nul absolument*, et que par conséquent il fallait qu'un tel ordre fut

consenté et mis de côté pour lui enlever tout effet légal.

Dans le cas actuel, l'ordre de Monsieur le juge Mathieu est directement pris à partie par le défendeur dans son exception à la forme.

Quoique j'entretienne le plus grand respect pour l'opinion du juge qui a émis cet ordre, je suis d'avis que cet ordre daté de Montréal, est irrégulier et devrait être déclaré non venu pour les fins de la présente instance de *Mandamus*.

J'ajoute de plus que cet ordre n'ordonne pas la comparution de la partie devant le juge qui a donné l'ordre ou aucun autre juge en chambre, à aucun jour fixé, et n'est pas adressé au protonotaire de la Cour Supérieure à Iberville non plus qu'à aucun autre protonotaire.

Une autre question se présente maintenant, savoir, si c'était par une exception à la forme que le défendeur pouvait se plaindre de cette irrégularité, quoique pourtant les parties dans leur argumentation n'aient rien dit qui démontrât un doute de leur part sur la rectitude du procédé.

Or, cet ordre constituant une des formalités faisant partie de la demande elle-même, j'en suis venu à l'opinion que l'irrégularité qui pouvait se rencontrer dans cet ordre, pouvait être opposée par voie d'une exception à la forme.

L'exception déclinatoire ne pouvait être employée dans l'instance parce que réellement la cause avait été bien portée en l'étant dans le district d'Iberville ; le juge en chambre dans ce dernier district avait droit de l'entendre et d'y adjuger.

Cette irrégularité ne pouvait donc affecter que la forme du procédé.

Le Code de Procédure dans ses articles relatifs aux exceptions à la forme, ne peut être interprété comme voulant dire qu'il ne peut y avoir d'autres informalités dont la partie poursuivie puisse prendre avantage par voie d'une exception à la forme, que celles qu'il mentionne nommément.

Carré, dans son 2e volume "Des lois de la procédure," page 152, parle des exceptions et les distingue en deux espèces, savoir: les exceptions péremptoires de l'instance et les exceptions péremptoires du fond. Les exceptions péremptoires de l'instance, dit-il, sont celles par lesquelles le défendeur requiert que

la demande soit rejetée pour n'avoir pas été dirigée régulièrement, sauf au demandeur à la former de nouveau. On ne compte, dit-il, que deux exceptions de ce genre : l'une qui résulte de ce que la demande n'avait pas été précédée de l'essai de conciliation : l'autre de ce que l'ajournement serait nul par vice de forme.

Or notre exception à la forme n'est pas autre que ce que le nouveau droit en France appelle, l'exception péremptoire de l'instance ; et de même que cette exception pouvait être employée en France, si l'instance n'avait pas été précédée d'une procédure exigée, de même dans notre droit, elle devrait pouvoir être pareillement employée, si l'instance n'était pas précédée de l'ordre légal requis.

Sur le tout, je suis d'avis que l'exception à la forme du défendeur doit être maintenue et l'action renvoyée avec dépens.

Cette action étant renvoyée sur une exception préliminaire, il n'y a pas pour la Cour, à rendre un jugement sur le mérite. La Cour ne pourrait rendre deux jugements qui éventuellement pourraient être une contradiction l'un de l'autre. Les parties ont consenti à produire tous leurs plaidoyers et à procéder sur le tout en même temps, mais le défendeur n'ayant pas abandonné pour cela son exception à la forme, les autres plaidoyers sont censés n'avoir été déposés au dossier que pour le cas où l'exception à la forme serait renvoyée.

Cette exception ayant été maintenue, et le bref étant annulé et cassé par le présent jugement, il ne reste à adjuger que sur la question des frais occasionnés par cette contestation au mérite.

Dans les cas ordinaires, lorsqu'il y a une exception préliminaire produite dans un dossier, elle doit être vidée avant que les plaidoyers au mérite ne soient filés, afin de connaître le sort de l'action sur l'exception préliminaire.

Cependant, dit l'art. 131 du Code de Procédure, "avant de répondre... aux exceptions préliminaires produites, le poursuivant peut, s'il croit que ces exceptions sont proposées uniquement pour retarder la cause, requérir par écrit le défendeur de plaider au mérite et le foreclore si la défense au mérite n'est pas produite dans les huit jours qui en suivent la demande." Et l'art. 132 ajoute : "Si le

défendeur produit sa défense au mérite, l'enquête a lieu sur toute la contestation, à moins que le tribunal n'en ordonne autrement, et s'il réussit sur l'exception préliminaire il a droit de recouvrer du demandeur tous les frais encourus sur la contestation au mérite à laquelle il a été forcé, suivant les dispositions de l'article qui précède."

D'après ces articles du Code de Procédure, il appert que la raison pour laquelle le demandeur est obligé de payer les frais accrus sur la contestation au mérite lorsque l'exception préliminaire réussit, c'est que le demandeur n'a pas voulu attendre que l'exception préliminaire fût jugée, qu'il a voulu courir le risque de frais rendus inutiles par le maintien possible de l'exception préliminaire, en un mot, comme le dit l'art. 132 du Code de Procédure, qu'il a forcé le défendeur à produire sa contestation au fond.

L'art. 131 dit que cette exigence par le demandeur d'un plaidoyer au fond devra être constatée dans et par une *requisition par écrit* de sa part.

Dans le cas actuel, aucune telle requisição n'apparaît au dossier. Il appert seulement que le défendeur a produit un plaidoyer au mérite et que le demandeur a accepté de lier contestation sur ce plaidoyer, et que les deux contestations préliminaire et au mérite ont été inscrites de consentement pour être entendues en même temps.

L'exception préliminaire, ayant suffi pour faire débouter l'action, le demandeur s'est-il rendu coupable d'une témérité pour laquelle il doive être puni par le paiement des frais d'une contestation qui n'a pas été jugée ?

Je ne le crois pas. Il ne paraît avoir fait rien autre chose que suivre la procédure purement volontaire du défendeur, et il ne peut être obligé de payer les frais d'une contestation sur laquelle le jugement rendu sur l'exception préliminaire empêche la Cour de donner une adjudication.

Si la Cour pouvait adjuger sur les deux contestations, la position serait différente, mais la Cour ne peut s'exposer à rendre deux jugements qui se contrediraient l'un l'autre, c'est-à-dire dont l'un débouterait l'action et l'autre devrait sur le mérite condamner le défendeur à faire ce qui est demandé de lui par l'action.

La Cour ne peut au surplus préjuger la question du mérite, le jugement rendu sur l'exception préliminaire ne renvoyant l'action que quant à présent, sauf tous droits aux demandeurs de la renouveler en observant les formalités voulues par la loi en pareil cas.

Les parties sur cette contestation au mérite devront donc être laissées à payer chacune leurs frais.

APPEAL REGISTER—MONTREAL.

Nov. 16, 1885.

Hendee & Connecticut & Passumpsic R. R. Co.—Heard on motion for leave to appeal from interlocutory judgment.

Burroughs & Wells.—Heard on motion to be relieved from foreclosure and allowed to file factum.

Normandeau & McDonnell.—Petition to renew security, granted.

Bell & Court, & McIntosh.—Case declared privileged; fixed for 20th.

Wheeler & Dupaul.—Continued to 17th to give new security.

Monette & Société St. J. Bte. de Valleyfield.—Case declared privileged; fixed for 24th.

Dudley & Darling.—Petition to take up instance, granted.

Brady & Stewart.—Declared privileged; fixed for 26th.

Robinson & Canadian Pacific R. R. Co.—Heard on merits. C. A. V.

Gilman & Campbell.—Heard on merits. C. A. V.

Stearns & Ross.—Part heard on merits.

Nov. 17.

Papineau & Corporation N. D. de Bonsecours.—Motion for order to Clerk of the Circuit Court to complete the record. Delay granted to 25th to file counter-affidavits.

Wheeler & Dupaul.—Application for new delay to give security, allowed on payment of costs of respondent's motion and \$10.

Stearns & Ross.—Hearing on merits concluded. C. A. V.

Northwood & Borrowman.—Heard on merits. C. A. V.

La Banque d'Epargne & La Banque Jacques Cartier.—Part heard on merits.

Nov. 18.

Burroughs & Wells.—Motion to be allowed to file factum, granted on payment of \$10 and costs of motion.

Menzies & The Molsons Bank.—Heard on petition for leave to appeal from interlocutory judgment.

Stevens & Chausse.—Appeal dismissed on motion of respondent.

La Banque d'Epargne & La Banque Jacques Cartier.—Hearing on merits concluded. C. A. V.

Rolland & Cassidy.—Continued to next term.

Grothé & Saunders.—Part heard on merits.

Nov. 19.

Vineberg & Moss.—Heard on motion of respondent for *acte of désistement*.

Grothé & Saunders.—Hearing on merits concluded. C. A. V.

Citizens Insurance Co. & Bourguignon.—Part heard on merits.

Nov. 20.

Muldoon & Dunn.—Fixed for 23rd.

Trudeau & La Société de Construction Montarville.—Inscription discharged.

Citizens Insurance Co. & Bourguignon.—Hearing on merits concluded. C. A. V.

Bell & Court, & McIntosh.—Heard on merits. C. A. V.

Cheney & Brunet, & Chauveau.—The record being missing, the hearing was postponed *sine die*.

Nov. 21.

Guerin & Loiseau.—Heard on merits. C. A. V.

Filiatreault & Prieur.—Heard on merits—C. A. V.

Almour & Cable.—Continued to 26th.

O'Keefe & Desjardins.—Heard on merits. C. A. V.

Evans & Monette.—Part heard on merits.

Nov. 23.

Vineberg & Moss.—*Acte* granted of the *désistement* and declaration.

Hendee & Connecticut & Passumpsic River R. R. Co.—Motion for leave to appeal from interlocutory judgment, rejected.

Menzies & The Molsons Bank.—Motion for leave to appeal from interlocutory judgment, granted.

Corner & Byrd.—Re-hearing ordered.

Stephens & Gillespie.—Judgment reversed, *sans recours*.

Black & Dorval.—Judgment confirmed, Monk, J., *diss*.

Bury & Silberstein.—Judgment confirmed.

Marchildon & Charland.—Judgment reformed, with costs of appeal in favor of appellant; costs in Court below in favor of respondent.

Neil & Craig.—(Case heard *ex parte*.) Judgment reversed.

Hamilton Powder Co. & Lambe (Two appeals).—Judgment confirmed.

Thayer & Foley.—Judgment confirmed.

Ross & Holland.—Hearing postponed to next term.

Evans & Monette.—Hearing on merits concluded. C. A. V.

Muldoon & Dunn.—Heard on merits. C. A. V.

Nov. 24.

Barthe & Lafleur.—Motion *rayée*, the parties not being represented.

Reinhardt & Davidson.—Same entry.

Daigneault & Levesque. Heard on merits. C. A. V.

Monette & La Société St. J. Bte. de Valleyfield.—Heard on merits. C. A. V.

De Blois & La Corporation de St. François.—Heard on merits. C. A. V.

Corporation of Hereford & Guay.—Heard on merits. C. A. V.

Eastern Townships Bank & Paquette.—Heard on merits. C. A. V.

Nov. 25.

St. Lawrence Navigation Co. & Lemay.—Judgment confirmed.

Grant & The Federal Bank.—Judgment reversed.

Lamarche & Enault.—Judgment confirmed.

Wadsworth & McCord.—Judgment confirmed, Dorion, C. J., and Cross, J., *diss*.

Papineau & Corporation N. D. de Bonsecours.—Heard on motion of respondent for order to Clerk of Circuit Court to complete record.

French & McGee.—Heard on merits. C. A. V.

Corporation du Comté d'Yamaska & Durocher.—Heard on merits. C. A. V.

Papineau & Taber.—Part heard on merits.

Nov. 26.

Papineau & Taber.—Hearing on merits concluded. C. A. V.

Gregoire & Gregoire.—Heard on merits. C. A. V.

Brady & Stewart.—Continued to next term.

Copeland & Leclaire.—Heard on merits. C. A. V.

Nov. 27.

Papineau & Corporation N. D. de Bonsecours.—Motion granted.

Malboeuf & Laurendeau.—Judgment confirmed.

Stephen & Hagar.—Judgment confirmed, Ramsay, J., *diss*.

Mullin & McCready.—Judgment reformed, Ramsay, J., *diss*.

Wheeler & Black.—Judgment confirmed, Ramsay, J., *diss*.

Hebert & Cantwell.—Judgment confirmed.

Gutrin & Loiseau.—Judgment confirmed.

Jones & Powell.—Judgment reversed.

Bessette & Gerbié.—Judgment confirmed.

City of Montreal & Walker.—Judgment confirmed.

Lemay & Laganère.—Judgment confirmed.

May & McIntosh.—Judgment confirmed.

Whitehead & White.—Petition that machinery in litigation be delivered to intervenant, White. Granted, security to be given within ten days.

McShane & Milburn.—Motion for extension of delay to give security. Two weeks' delay granted.

McShane & Hall.—Same entry.

The Court adjourned to December 30 for the purpose of rendering other judgments.

TRIBUNAL CIVIL DE LA SEINE, (France)
11 août 1885.

SIEUR V... v. M...

Maitres—Domestiques—Fournisseurs—Responsabilité.

JUGÉ:—Que le maître, qui donne journellement à ses domestiques l'argent nécessaire pour les dépenses du ménage, et qui n'a aucun crédit ouvert chez un fournisseur, ne peut être tenu au paiement des fournitures que sa domestique prend à crédit chez ce dernier.

Voici le jugement rendu par le tribunal de la cinquième chambre :

"Attendu que des faits et documents de la cause, il résulte et que d'ailleurs il n'est pas contesté par V... 1o. que la femme M... cuisinière, recevait journellement de ses maîtres les fonds nécessaires à l'alimentation de leur maison; 2o. que la dite cuisinière avait pour mandat exprès de n'acheter qu'au comptant; 3o. que, depuis le 1er juin 1881, date de la prise de possession de son fonds de marchand boucher, V... n'a jamais été en relations à l'occasion des fournitures qu'il livrait à la femme M... ni avec le défendeur, ni avec l'épouse du dit défendeur; 4o. que jamais aucune demande de crédit ne lui a été faite par ces derniers; 5o. qu'ainsi que cela se pratique généralement à Paris entre les fournisseurs et les particuliers qui reçoivent les fournitures à crédit et ne les payent qu'à la semaine, au mois ou à d'autres termes convenus, il n'existait entre V... et la maison du défendeur aucun carnet de crédit; 6o. que depuis la dite date du 1er juin 1881 jusqu'au 11 avril 1883, c'est-à-dire pendant plus de vingt-deux mois de fournitures s'élevant au total à 3,427 fr. 40; V... n'a reçu aucun acompte de la femme M... et n'a adressé aucune réclamation au défendeur, fait établi par la lettre de la dame V... en date du 11 avril 1883, laquelle sera enregistrée en même temps que le présent jugement.

"Attendu que, dans ces circonstances de fait, il est constant que V... a suivi la loi de la femme M... et que, dès lors, sa demande n'est nullement fondée vis-à-vis du défendeur sur lequel il ne saurait faire peser les conséquences d'un fait dû uniquement à son imprudence et à sa négligence.

"Par ces motifs,

"Déclare V... mal fondé dans sa demande et le condamne à tous les dépens.

Cette décision est conforme à la jurisprudence. Arrêt de la Cour de Cassation 22 janvier 1813—Tribunal civil de la Seine 29 août 1870—8 août 1872.

(Rapport de M^{re} LOUIS ALBERT.)

(J. J. B.)

GENERAL NOTES.

A case stated by a revising barrister in England, says: "It was proved before me that the land in question had that year no actual value, not even the chasing of a grasshopper."

The Chinese are asserting their rights in the courts. In a case lately, Tom Lat and Ah Quong sue a daily paper for publishing a rumor that leprosy existed in their laundry.

The anxious fairness with which Mr. Justice Lopes treated the defendants in *Regina v. Jarrett* was extended after the termination of the trial to the conductors of the newspaper involved in the case, and the learned judge was good enough to answer a letter from the acting editor, and to explain words used by him in passing sentence. To send a letter to a judge commenting on a trial in which he has taken part is a contempt of Court the more gross because it puts the judge in a dilemma. If he does not answer it, it may be said of him that he admits its contents. If he answers it, he condones the offence. The latter course has been forced upon Mr. Justice Lopes in this instance, but the occasion must not be taken as a precedent.—*Law Journal* (London.)

The *Georgian Law Reporter* is a new venture in legal journalism, containing the decisions of the Supreme Court of Georgia.

The cases on the calendars of the Courts of Record in New York at the opening of the terms numbered 5,020, divided as follows: 1,227 in the Superior Court, 1,660 in the Supreme Court, 1,130 in the Common Pleas, 354 in the city Court, 600 in the United States District Court. This enumeration does not include cases in the Surrogate's Court. Investigation shows that on an average there are thirty-two new actions at law begun in the various Courts of this city every working day in the year. To dispose of this vast volume of litigation there are twenty-seven judges, and to appear for the litigants, nearly 6,000 lawyers. So from the present condition of the calendars there will not be cases enough to go around and give the officers of the Court one apiece.

In *Re Chapple, Newton v. Chapman*, 51 L. T. Rep. N. S. 748, Mr. Justice Kay is reported to have said, "I always struggle against being bound by authority, unless the principle upon which the authority proceeds commends itself to my judgment."

One of the justices in the Maine Supreme Court occasionally amuses himself, when alone, by taking down an old fiddle and playing on it. His father was the fiddler of the village, a nomadic and jovial soul. Said an old neighbour the other day: "When I went to muster sixty years ago, I used to see the judge and his father playing the fiddle for dances at sixpence per tune. That was the regular price in those days. None of the dancers ever supposed that their little fiddler would become a judge of the Supreme Court."—*Levinston Journal*.

The first lady student ever admitted to any department of Yale College, outside the Art School, entered the senior class of the law school on the first of the present month. The young lady is Miss Alice J. Jordon, a graduate of the University of Michigan. The *New York World* in speaking of her admission, says: "She is prepossessing and intellectual."

Bread sold at a shop to a purchaser and delivered by the baker is not 'bread for sale' which, under the statute, if carried in a cart, must be accompanied by weights and scales (*Daniel v. Whitfield*, 54 Law J. Rep. M. C. 134).

The Legal News.

VOL. VIII. DECEMBER 12, 1885. No. 50.

They appear in England to have their "grand old men" on the bench as well as in the muddy pool of politics. Vice-Chancellor Bacon, according to the *Solicitor's Journal*, having triumphantly passed through a cold, has returned to work full of vigor and vivacity; and at eighty-seven years of age, displays a freshness of spirits not possessed by many of his sedate, though juvenile colleagues. Then again, it was remarked that the judges on the bench at the beginning of the last legal year, all made their appearance at the opening of the present year, the Lord Chancellor excepted, and his absence was attributable to the change of administration. The oldest of the judges will be eighty-eight next February, and their average age is sixty-three.

If leave to appeal from the decision of the Supreme Court had been granted by the Privy Council in *Montreal City Passenger Railway Co. & Parker*, the functions of the Judicial Committee would have been considerably enlarged. As Sir Richard Couch observed, it was pretty much a question of evidence, and the Judicial Committee could not disturb the judgment of the Supreme Court without undertaking to examine the evidence anew. The appeal in ordinary course having been taken away by statute, this seems to be peculiarly a case in which the appeal as "an act of grace" should not be accorded. The case had been fully discussed in three courts, and the original judgment had been restored by the final decision. "Interest reipublice ut sit finis litium."

The suggestion, in some London journals, that the reception of Chief Justice Waite (Chief Justice of U. S. Supreme Court) in England was not in keeping with that accorded to the Chief Justice of England

when he visited the United States, has elicited the following from Lord Coleridge:—"I was sorry to see from the *Albany Law Journal* that several of our papers have found fault with the reception of your good and honored chief justice. I can only say that we did our best, but he came at a most unfortunate season. The circuits were going on, and most of the judges were out of London. But he came here one day, and I announced him, and the bar received him standing, and stood up when he went away. He sat at my right hand as if he had been a member of the court. We had a reception of queen's counsel, and a curious case as to connuance of plea by the University of Oxford, in which the charters of Henry VIII and Queen Elizabeth were produced in original, and the chief justice inspected them both. I pressed him and Mrs. Waite to come and stay with me, but (wisely, I think) he preferred the freedom of a hotel. However, I got together all the great lawyers I could, and gave him and Mrs. Waite a dinner. I did all in my power in other ways, not merely as a duty, but from gratitude to him and his colleagues for the great kindness and honor they showed me, and from deep and unfeigned regard for the chief justice himself. He writes to me in a strain of thorough satisfaction:—'You know how well I was taken care of in London. Everywhere on my travels I was equally well treated. My name, if I chose to give it, was a passport to any place I wanted to see, and on the circuit I met Baron Pollock at Lincoln, and Mathew and Wills at York. They did every thing that was possible for me, and I enjoyed every moment of my stay with them. The bar of the north-eastern circuit were very anxious that I should dine with them, but I had to decline.' There is more to the same effect, but this will show you that the chief justice himself had no sense of slight or of discourtesy. I had proposed a bar dinner to him in one of the halls of the Inns of Court, but so many of the bench and bar must have been absent that it was thought better not to have one. I hope you will let your readers know that as far as we could we did honor to a man who most justly deserves it on every ground, public and private."

THE MONTREAL LAW REPORTS FOR NOVEMBER.

The Montreal Law Reports for November comprise pp. 432-480 of the Queen's Bench Series, and pp. 448-480 of the Superior Court Series. In the former, eight cases are reported. In *Hamilton Powder Co. & Lambe* the Court were unanimous in maintaining the decision of the Court below, which affirmed the right of the local legislature to enact a penalty for keeping a powder magazine without a license. But the judges differed as to the reasons. The Chief Justice and Judge Cross held that the local legislature had the right to enact the penalty as a police regulation, even assuming the license fee to be *ultra vires*. Judge Ramsay, on the other hand, holds that the local legislature has the right to exact a license fee under the B. N. A. Act, sect. 92, No. 9. In *City of Montreal & Walker*, it was unanimously held that the City of Montreal, under a power 'to license and regulate' junk stores, could not levy a revenue tax of fifty dollars on each license issued (in addition to the ordinary taxation). In *Reg. & Provost*, a Reserved Case was sent back for amendment, and subsequently the validity of the 32 & 33 Vict., c. 29, s. 24, was maintained without hesitation. In *Bury & Samuels* an interesting question of procedure upon execution was settled. Where the judgment creditor has seized and sold sufficient to cover his claim, and oppositions on the moneys are filed alleging the defendant's insolvency, the plaintiff cannot obtain an *alias* writ, to sell the remainder of the defendant's effects, without proof of his insolvency.

In the Superior Court Series for November sixteen cases are reported. In *Cité de Montréal v. Séminaire St. Sulpice* it is held that the exemption from municipal taxes enjoyed by educational institutions extends to taxes imposed for special purposes. In *Macfarlane v. McIntosh* it was decided that a tender of rent, not being a commercial matter, cannot be proved by parol evidence. In *La Cie. de Prêt & Lemire*, the Court held that there is no such thing as a demurrer to a demurrer. In *Cité de Montréal & Beaudry*, it was decided that a proprietor in the City of Montreal cannot be sued

for failure to remove snow or ice from the sidewalk before a house or lot owned by him, unless he occupies the house himself, or the lot be a vacant lot. In *Minto v. Foster*, it was held, on demurrer, that the condition annexed to a bequest of money to a married woman *commune en biens*, that it shall not be subject to the control of her husband, and shall be for aliment, and not subject to seizure, is valid, and the husband cannot bring any action in respect of such money. In *Gaudry v. Judah*, the Court of Review held that where dealings between the parties have been conducted upon the basis of pass-books held by each, and only one is produced, and it is reasonably substantiated by testimony, it must prevail. The case of *Desmarais v. Picken* illustrated the right of the vendor to re-sell at the purchaser's risk, where the latter refuses to accept on a frivolous pretence. The case of *Minogue v. Quebec Fire Ass. Co.* shows how a material concealment voids the contract of insurance. There are also a number of other cases of considerable importance.

COURT OF QUEEN'S BENCH—MONTREAL.*

Procedure—Execution—Insolvency of defendant—Opposition.

Held:—That where a judgment creditor has caused the seizure and sale of a portion of the defendant's effects, sufficient to cover his claim as stated in the writ of execution, he cannot subsequently, upon a mere allegation that the defendant is insolvent, and that oppositions *afin de conserver* have been filed by other creditors, obtain an order for an *alias* writ of execution, for the purpose of seizing and selling the remainder of the defendant's effects. *Bury*, Appellant, and *Samuels*, Respondent.—Dorion, C. J., Monk, Ramsay, Cross, Baby, J.J. (Ramsay and Baby, J.J., diss.). March 24, 1885.

Ship—Charter-party—Demurrage—Dead Freight.

The charter-party provided that the ship was to be loaded "as fast as can be received" in fine weather, and ten days' demurrage

* To appear in Montreal Law Reports, 1 Q. B.

"over and above the said lying days, at forty pounds per day. The ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage due under this charter-party, but charterers' responsibility to cease upon shipment of the cargo, provided the cargo be worth the freight, demurrage, etc., on arrival at the port of discharge. Should ice set in during loading so as to endanger the ship, master to be at liberty to sail with part cargo and to have leave to fill up at any open port on the way homeward for ship's benefit."

Held (Cross, J. diss.):—That notwithstanding the clause as to ship having leave to fill up at other ports on the homeward voyage, the shipowner was entitled to dead freight, owing to the setting in of ice having occasioned the departure of the vessel before the loading was completed, the completion of the loading having been retarded and prevented by the fault of the charterer. *Lord et al.*, Appellants, and *Davison*, Respondent.—Dorion, C.J., Monk, Tessier, Cross, Baby, JJ., (Cross, J. diss.). April 2, 1885.

Powers of Provincial Legislatures—License for storage of Gunpowder—41 Vict. (Q.) cap. 3, sections 170, 171—Action for Penalty.

Held:—1. That a powder manufactory, where a quantity of powder exceeding 25 lbs. is kept, is a powder magazine within the meaning of 41 Vict. (Q.) cap. 3, sect. 170.

2. (By the majority of the Court):—That the Act above cited, which imposes a penalty for failing to take out a license, is not *ultra vires*, being in the nature of a police regulation, and as such within the powers of the local legislature, even supposing the provision of the Act requiring a fee of \$50 to be paid for a license were *ultra vires* as a revenue tax.

(By Ramsay, J.) That the Act is valid, not as a police regulation, but as a license Act, the local legislatures having power, under the B. N. A. Act, sect. 92, ss. 9, to pass an act for raising revenue by a license fee. *The Hamilton Powder Co.*, Appellants, and *Lambe et al.*, Respondent.—Dorion, C.J., Monk, Ramsay, Cross, JJ. November 23, 1885.

Municipal Corporation—Power to license and regulate—License fee—Reception of thing not due—C. C. 1047.

Held:—1. That a power granted to a municipal corporation to license and regulate a particular business does not authorize the exaction of a revenue duty, but only of a moderate fee sufficient to cover the cost of issuing the licenses, and of inspecting and regulating the same. So, where the City of Montreal was empowered to license and regulate junk stores, it was held that the exaction of a license fee of \$50 per annum was illegal.

2. That where such fee had been paid to the city during three years in succession before contesting the validity of the exaction, the same might be recovered by the person who had paid the fee. *The City of Montreal*, Appellant, and *Walker*, Respondent.—Dorion C.J., Monk, Cross, Baby, JJ. November 27, 1885.

Reserved Case—Amendment.

Held:—That where a Case Reserved for the consideration of the Court of Queen's Bench, pursuant to the Statute in that behalf, does not contain a question which, in the opinion of the full Court, it is essential to decide in connection with such case, it may be sent back to the Court which reserved the same, for amendment. *Regina v. Provost*.—Monk, Ramsay, Tessier, Cross, Baby, JJ. January 27, 1885.

Powers of Federal Legislature—32 & 33 Vic. c. 29, s. 44—Jury Law, Province of Quebec, 46 Vic. c. 16 (Q.)—Indictment for Robbery.

Held:—1. That the Parliament of Canada, in declaring, by 32 & 33 Vic. c. 29, s. 44, that "every person qualified and summoned as a Grand Juror, or as a petty juror, in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be and shall be held to be duly qualified to serve as such juror in that Province, etc." did not legislate *ultra vires*, and therefore the Jury Act of the Province of Quebec is constitutional.

2. The word "together" is not essential in an indictment against two persons for robbery,

to show that the offence was a joint one. *Regina v. Provost*.—Dorion, C. J., Monk, Tessier, Cross, Baby, JJ., March 19, 1885.

Contract—Lease of Steam-power—Sub-lease.

Held :—That a contract of lease of steam-power to the extent of six-horse power, was not violated by sub-letting a portion of the motive power, there being no more power used than was mentioned in the lease, and there being no prohibition against sub-letting.—*Sharpe et al.*, appellants, and *Cuthbert et al.*, respondents.—Monk, Ramsay, Tessier, Cross, Baby, JJ. May 26, 1885.

Procedure—Declaration of Tiers Saisi—Contestation.—C. C. P. 619.

Held :—Where the garnishee has declared that he owes the defendant nothing, but in answer to questions put by the judgment creditor, under C. C. P. 619, has made admissions which apparently show that he has a sum in his hands belonging to the defendant, that the proper course is to contest the declaration, and not to inscribe for judgment *ex parte* on such statements. *Grant*, appellant, and *The Federal Bank of Canada*, respondent. Dorion, C. J., Monk, Cross, Baby, JJ. Nov. 25, 1885.

PRIVY COUNCIL.

LONDON, NOV. 19, 1885.

Coram LORD FITZGERALD, LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR R. COUCH.

THE MONTREAL CITY PASSENGER RAILWAY CO., Appellants, and PARKER, Respondent.

Appeal from Supreme Court—Leave to appeal refused on question of evidence.

This was an application for special leave to hear the appeal of the appellants against a decision of the Supreme Court of Canada.

Mr. *Jeune* said the action was brought for personal injuries against the Montreal City Passenger Railway company. The cause of action was that the respondent was travelling in a waggon through the streets of Montreal, and across the track of the railway, and the waggon in which he was, caught the rail in some manner and he was thrown out of it.

LORD FITZGERALD—Is there any question of amount?

Mr. *Jeune*.—No, my lord. The question is one of law, and of considerable importance to the railways in Canada. That is the proposition which I shall have to contend for, and what I wish to show is this, that the learned judge of the court below in the first instance never decided the case on the facts at all, but decided it on what I submit is clearly an erroneous principle of law of very considerable importance indeed. What he held was that this company, being governed by a by-law and by a provision of an act of Parliament the by-law must prevail. The by-law provided that the railway shall be liable for accidents caused by the obstruction made by placing the rails in the streets, and the act of parliament provided that the rails should be laid down in a particular way. The view of the railway company (and on which they have acted) is this: That if they make their railway through the streets according to the provision of an act of Parliament they are not liable for accidents caused by their rails being so constructed, and that the provision in the by-law which makes them liable in all cases practically is subjected to the express provision of the act of Parliament, which says that they must lay down their rails in a particular way. If they do lay down their rails in that way they are not liable for the rails being so laid down. That is what I say the court of first instance decided wrongly in holding that the company was liable for the accident caused apart from negligence. The learned judge did not decide on the real facts at all, that is to say, on the question of negligence on the part of the defendants, but he decided it on an erroneous principle of law. Then the case went to the Court of Appeal, and there they decided the facts by four to one in favor of the railway company that there was no negligence. It then went to the Supreme Court, who decided the question of fact the other way. It was a case of considerable hardship on the railway company, for the judge in the Court of first instance heard the evidence and pronounced no opinion upon the facts, but went wrong in his law, and the Court of Appeal on that decided by a majority of four to one on the facts

in favor of the company, and then the Supreme Court reversed that judgment on the facts also by a majority of four to one. Opinion is equally divided among the judges, and there still remains the question in which the judge of the first court was clearly wrong, viz., that under the codes of this by-law and this act of Parliament, the railways in Canada are liable. I shall submit that the decision is clearly erroneous.

SIR BARNES PEACOCK—But it is very hard on the plaintiff to do battle on behalf of the public.

Mr. *Jeune*—I say that there is no negligence on the part of the railway company.

SIR B. PEACOCK—But the Supreme Court have found that there was.

Mr. *Jeune*—But the same number of judges have found that there was not. The learned counsel then called attention to the principle of the thing. The by-law was a by-law of the city of Montreal—"And the said company shall be liable for damages arising either from the construction of the railway or from the works they shall cause to be laid down in the streets." Then there was an act of the Legislature which provided that the rails of the company should be raised flush with the streets and the highways, and that the railway track should conform with the same, so as to offer the least impediment to the ordinary traffic, and that the ordinary vehicles might use the same tracks, provided that they did not interfere with the cars of the company. The by-law says that "you shall be liable for all damages arising from the construction of the railway or of the works which cause it;" yet Parliament says: "You shall make your railway in a particular manner." The court of first instance held in effect that on the by-law they were liable, apart from any question of whether they made the railway according to the act of Parliament or not; but inasmuch as the by-law said they were liable in all cases whether their rails were made properly or not, they entirely ignored the effect of the Dominion Act and treated the corporation by-law alone as law. I say that is bad law.

LORD MONKSWEILL—The Supreme Court held that there was evidence of negligence. They took a different view of the evidence from the court of the province.

Mr. *Jeune*—As regards four judges they say "You are right. The railway company are not liable if they lay their railway in accordance with section 5, and in this case we say that it was not laid according to section 5."

LORD HOBHOUSE—They were overruled.

Mr. *Jeune*—Yes, they held on the facts in favor of the company. When they came to the Supreme Court they took a different view, and they held that there was negligence on the part of the company in not laying their rails in accordance with the section.

SIR B. PEACOCK—We should have to go into a question of fact as to this negligence. Is that a case on which we can advise Her Majesty?

Mr. *Jeune*—I cannot dispute that if you decide the question of law then you must go into the facts.

SIR R. COUCH—It seems to me very much a question of fact.

Mr. *Jeune*—Well, the two courts below, with an equal number of judges, have taken a different view of the facts, and neither has heard the evidence of the witnesses.

SIR B. PEACOCK—We should be in the same position as those courts. We should not have heard the evidence.

Mr. *Jeune*—Just so.

Their lordships consulted, and

LORD FITZGERALD said:—Their lordships are of opinion that there are not sufficient grounds in this case to recommend Her Majesty to allow the appeal.

Judgment accordingly.

THE QUEEN v. RIEL.

Memorandum respecting the case of the Queen v. Riel, prepared at the request of the Committee of the Privy Council.

The case of Louis Riel, convicted and executed for high treason, has excited unusual attention and interest, not merely in the Dominion of Canada but beyond its limits. Here it has been made the subject of party, religious, and national feeling and discussion; and elsewhere it has been regarded by some as a case in which, for the first time in this generation, what is assumed to have been a political crime only has been punished with death.

The opponents of the Government have asserted that the rebellion was provoked, if not justified, by their maladministration of the affairs of the North-West Territories, and inattention to the just claims of the half-breeds.

With this question, which has been made one of party politics, it is not thought becoming to deal here.

Upon such a charge, when made in a constitutional manner, the Government will be responsible to the representatives of the people, and before them they will be prepared to meet and disprove it.

Appeals to the animosities of race have been made in one of the Provinces with momentary success. Should these prevail, the future of the country must suffer. Parliament will not meet for some time, and in the interval, unless some action is taken to remove these animosities, they will gain ground, and it will become more difficult to dispel belief in the grounds which are used to provoke them.

It is thought right, therefore, that the true facts of the case, and the considerations which have influenced the Government, should be known, so that those who desire to judge of their conduct impartially may have the information which is essential for that purpose.

It has been asserted that the trial was an unfair one, and before a tribunal not legally constituted; that the crime being one of rebellion and inspired by political motives, the sentence, according to modern custom and sentiment, should not have been carried out; and that the prisoner's state of mind was such as to relieve him from responsibility for his acts.

After the most anxious consideration of each one of these grounds the Government have felt it impossible to give effect to any of them, and have deemed it their duty to let the law take its course.

I am now desired, in a matter of such grave importance and responsibility, to place on record the considerations which have impelled them to this conclusion:—

1. As to the jurisdiction of the court and the fairness of the trial.

It should be sufficient to say that the legality of the tribunal by which he was tried

has been affirmed by the Privy Council, the highest court in the Empire, and has seemed to them so clear that the eminent counsel who represented the prisoner could not advance arguments against it, which were thought even to require an answer.

It has been said that a jury composed of six only, and the absence of a grand jury, are features so inconsistent with the rights of British subjects that the prisoner had still ground of complaint; but, as was pointed out in the Privy Council, the same crime may be tried elsewhere in the British Empire, notably in India, without any jury, either grand or petty, and this mode of trial has been sanctioned by the Imperial Parliament.

It is to be observed also, that the offence was tried in the country in which it was committed, under the law as it then existed and had existed for years, and that this is a course of which no offender can fairly complain, while it is a right to which every criminal is entitled.

Of the competency of the court, which had been affirmed by the full court in Manitoba, the Government saw no reason to entertain doubt; but having regard to the exceptional character of the case, the usual course was departed from in the prisoner's favor, and a respite was granted, to enable him to apply to the ultimate tribunal in England, and thus to take advantage to the very utmost of every right which the law could afford him.

The fairness of the trial has not been disputed by the prisoner's counsel, nor challenged either before the Court of Appeal in Manitoba, or the Privy Council. It has, on the contrary, been admitted, not tacitly alone by this omission, but expressly and publicly. It may be well, however, to state shortly the facts, which show how the duty which the Government fully acknowledged both to the public and the prisoner has been fulfilled.

It was most desirable not only to ensure the impartial conduct of the trial, which would have been done by the appointment of any barrister of known standing, but to satisfy the public that this had been effected; and in view of this the prosecution was entrusted to two leading counsel in Ontario, known to be in sympathy with different political parties. With them was associated a

French advocate of standing and ability in Quebec, and the personal presence and assistance of the Deputy Minister of Justice was given to them throughout the proceedings.

The procedure adopted and the course taken at the trial, to be now shortly stated, as it appears on the record, will show that every opportunity for the fullest defence was afforded; and it is needless to add, what is well known and recognized, that the prisoner was represented by counsel whose zeal and ability have made it impossible to suggest that his defence could in any hands have been more carefully or more ably conducted.

The charge was made against the prisoner on the 6th of July, 1885, and the trial was then fixed to take place on the 20th of that month, of which the prisoner was duly notified.

On the same day a copy of the charge, with a list of the jurors to be summoned and of the witnesses to be called, was duly served upon him, the Crown waiving the question whether this was a right which could be claimed, and desiring, as far as possible, to afford every privilege which, under any circumstances or before any tribunal, he could obtain, and which, consistently with the procedure otherwise prescribed in the Territory, could be granted to him.

On the day named, the prisoner, having been arraigned, put in a plea to the jurisdiction, to which the Crown at once demurred, and this question was then argued at length. The grounds taken by the prisoner's counsel had been in effect decided unfavorably to their contention by the Court of Queen's Bench in Manitoba in a recent case, and the presiding judge held that it was therefore impossible for him to give effect to them.

This decision having been announced, the prisoner, by his counsel, then demurred to the information, which was alleged to be insufficient in form, and this demurrer having been argued, was also overruled.

The prisoner then pleaded not guilty, and his counsel applied for an adjournment until the next day, to enable them to procure affidavits on which to apply for a further postponement of the trial; and, the Crown not objecting, the court adjourned.

On the following day, July the 21st, the

prisoner's counsel read affidavits to the effect that certain witnesses not then present were necessary for the defence, and that medical experts on the question of insanity were required by them from the Province of Quebec and from Toronto. They represented that the prisoner had not had means to procure the attendance of these witnesses, and desired an adjournment for a month, during which they would be able to obtain it.

In answer to this application, of which the Crown had no notice until the day previous, the Crown counsel pointed out that these medical witnesses, as well as some others in the North-West Territories who were wanted, could all be got within a week; and they offered not only to consent to an adjournment for that time, but to join with the prisoner's counsel in procuring their attendance, and to pay their expenses.

The counsel for the prisoner accepted this offer, which the presiding judge said was a reasonable one, and the trial was adjourned until the 28th. In the meantime the witnesses were procured. They were present and were examined for the prisoner, and their expenses were paid by the Crown, the medical gentlemen being remunerated as experts at the same rate as those called for the prosecution. The other grounds which had been urged for delay were not further pressed.

The court met on the 28th. No further adjournment was asked for, and the trial proceeded continuously until it was concluded on the 1st of August. The exceptional privilege accorded to persons on trial for treason, of addressing the jury after their counsel, was allowed to the prisoner and taken advantage of.

As to the general character of the tribunal, and the ample opportunity afforded to the prisoner to make his full defence, it may be well to repeat here the observations of the learned Chief Justice of Manitoba in his judgment upon the appeal.

"A good deal," he remarked, "has been said about the jury being composed of six only. There is no general law which says that a jury shall invariably consist of twelve, or of any particular number. In Manitoba, in civil cases, the jury is com-

"posed of twelve, but nine can find a verdict. In the North-West Territories Act, the Act itself declares that the jury shall consist of six, and this was the number of the jury in this instance. Would the Stipendiary Magistrate have been justified in impanelling twelve, when the Statute directs him to impanel six only? It was further complained that this power of life and death was too great to be entrusted to a Stipendiary Magistrate.

"What are the safeguards?

"The Stipendiary Magistrate must be a barrister of at least five years standing. There must be associated with him a Justice of the Peace and a jury of six. The court must be an open public court. The prisoner is allowed to make full answer and defence by counsel. Section 77 permits him to appeal to the Court of Queen's Bench in Manitoba, when the evidence is produced, and he is again heard by counsel, and three judges re-consider his case. Again, the evidence taken by the Stipendiary Magistrate, or that caused to be taken by him, must, before the sentence is carried into effect, be forwarded to the Minister of Justice; and sub-section eight requires the Stipendiary Magistrate to postpone the execution from time to time, until such report is received, and the pleasure of the Governor thereon is communicated to the Lieutenant-Governor. Thus, before sentence is carried out, the prisoner is heard twice in court, through counsel, and his case must have been considered in Council, and the pleasure of the Governor thereon communicated to the Lieutenant-Governor.

"It seems to me the law is not open to the charge of unduly or hastily confiding the power in the tribunals before which the prisoner has been heard. The sentence, when the prisoner appeals, cannot be carried into effect until his case has been three times heard, in the manner above stated."

The evidence of the prisoner's guilt, both upon written documents signed by himself and by other testimony, was so conclusive that it was not disputed by his counsel. They contended, however, that he was not

responsible for his acts, and rested their defence upon the ground of insanity.

The case was left to the jury in a very full charge, and the law, as regards the defence of insanity, clearly stated in a manner to which no exception was taken, either at the trial or in the Court of Queen's Bench of Manitoba, or before the Privy Council.

2. With regard to the sanity of the prisoner and his responsibility in law for his acts, there has been much public discussion.

Here again it should be sufficient to point out that this defence was expressly raised before the jury, the proper tribunal for its decision; that the propriety of their unanimous verdict was challenged before the full court in Manitoba, when the evidence was discussed at length and the verdict unanimously affirmed. Before the Privy Council no attempt was made to dispute the correctness of this decision.

The learned Chief Justice of Manitoba says in his judgment: "I have carefully read the evidence and it appears to me that the jury could not reasonably have come to any other conclusion than the verdict of guilty. There is not only evidence to support the verdict, but it vastly preponderates."

And again: "I think the evidence upon the question of insanity shows that the prisoner did know that he was acting illegally, and that he was responsible for his acts."

[Concluded in next issue.]

GENERAL NOTES.

What contemptible questions the law is compelled to stoop to is illustrated in the case of *Le May v. Welch*, 51 L. T. Rep. (N.S.) 867, where the Court of Appeals gravely sit in judgment on the shape of "a dude" collar, on a charge of infringement of patent. Baggallay, L. J., says: "Here is a collar of particular shape, which the plaintiffs call the 'Tandem Collar.' It is a collar which encircles the neck, as all collars do, but it has no band like the old-fashioned collars. It has a stud-hole at the bottom, leaving a considerable amount of space above, not only up to the line where the collar encircles the neck, but a broad rim before there comes a cut in the collar, which cut has been referred to very much. It has been called a segmental cut. A more correct way of describing the collar would be 'an all-round collar,' having a wedge-like form cut into it," etc. And two other judges also express opinions on the momentous question of novelty of invention.—*Albany Law Journal*.

The Legal News.

VOL. VIII. DECEMBER 19, 1885. No. 51.

The case of *Sweeney v. Bank of Montreal* adds another to the list of cases in which the final judgment of the Supreme Court has only a minority of judges to support it. The original judgment, rendered by Mr. Justice Rainville in the Superior Court, dismissed the action (5 Leg. News, 66). That decision, after two hearings, was unanimously affirmed in appeal by the Court of Queen's Bench constituted with five judges (Dorion, C. J., Monk, Baby, Doherty, Caron, JJ.) Finally in the Supreme Court the judgment has been reversed, Strong, J., dissenting. So the smaller number prevail over the seven judges who ruled the other way. It may be added that the result has been to some extent a surprise to the profession, for although this case has attracted considerable attention from the bar during its progress through the Courts, we are not aware that any one not personally concerned in it anticipated the conclusion now arrived at by the majority of the Supreme Court.

The slave-making and slave-driving instinct is very strong in some natures, regardless of justice and humanity, and its developments, unfortunately, are more repulsive than rare. In *Larson v. Berquist*, before the Kansas Supreme Court, Nov. 7 (8 Pac. Rep. 407), a parent sued to recover damages for the wilful negligence and misconduct of the defendants toward his infant daughter while in their service. The plaintiff alleged that the daughter was an inexperienced girl of tender years, who was employed by the defendants as a house servant to do such work as was suitable to her years and strength, and that during her employment her menses began, causing her great pain and sickness, and that after gaining her confidence the defendants took advantage of her weakness, youth and inexperience, and in order that she might continue in their service, and perform a great and unusual amount of labor for them, they

negligently, wilfully and wickedly advised her that menstruation was a dangerous disease, likely to cause insanity and death, and that the best and only known remedy therefor was hard and unrelenting labor, and that by reason of this advice and the influence exerted upon her by the defendants, she was exposed to danger and hardship, and made to do work for them far beyond her strength, and compelled to perform the labor of two persons, by reason of which she became very sick, and was permanently crippled and disabled, and that ever since that time her father has been not only deprived of her assistance and service, but has been compelled to expend for her care and medical attendance a large sum of money. The defendants demurred, contending that the girl was under no obligation to perform labor beyond her strength, and might have declined the service exacted. The Court said this would be true if the person injured had been an adult of ordinary prudence and discretion, but in the case of a child of tender years a different rule applies. So the demurrer was held bad.

In referring to the veterans of the bench last week we might have added a reference to the retirement of Chief Justice Daly, of the New York Common Pleas, after a judicial service of forty-one years. The last case he heard was argued by an ex-judge who argued his first case before him in 1853. Judge Daly, like the ex-Chief Justice of our Superior Court, retires with the good wishes and respect of everybody, and with a well-earned reputation for learning and integrity.

The "Laws of Intestacy in the Dominion of Canada" is the subject of a learned treatise by Mr. Armstrong, Q.C., C.M.G., late Chief Justice of St. Lucia. The author has examined with care the law existing in the several provinces, and notes the decisions bearing upon points of difficulty. He regrets the lack of uniformity in the disposition of intestate property, and suggests that this might be remedied, if the Provinces did not thereby waive the right to legislate under sect. 94 of the B.N.A. Act. The pamphlet embodies the result of much independent investigation, and should be in the hands of every lawyer.

In an essay prepared lately by Mr. I. T. Williams, of Chappaqua, on "Arbitration vs. Suits at Law," some cogent facts are urged against arbitrations. Mr. Williams says "one arbitrator is invariably a blind and thorough-going partisan of one party; another arbitrator is the like for the other; and the third, even if impartial, always has to compromise to effect an approach to justice. Their disregard of the simplest rules of evidence alone is sufficient to condemn them. There is only one other legal tribunal so absurd and so unsatisfactory, and that is an ecclesiastical council." And he adds that there are one thousand disputes settled in courts of law to one settled by arbitration, a fact which he holds to be proof that "there are in the community one thousand intelligent men who believe that suits at law are a better method of settling disputes than arbitration, to one who believes that arbitration is a better method of settling disputes than suits at law."

*SUPERIOR COURT, MONTREAL.**

Prohibition—Jurisdiction—Cour des Commissaires—Ville—Interprétation législative.

Jugé:—Que lorsqu'une partie du territoire d'une paroisse, où est établie une Cour des Commissaires, est érigée en ville, le fait de cette incorporation en ville n'enlève pas à la cour sa juridiction ni sur la paroisse, ni sur la ville. *Lemieux et La Cour des Commissaires de la Paroisse de Longueuil*, Jetté, J., 22 septembre, 1885.

Procedure—Judgment, Notice of—Taxation of costs—C. C. P.

HELD:—1. That when a judgment orders the delivery of certain goods within 15 days from the rendering of the judgment, and, in default of so doing, to pay a specified sum of money, service of the judgment is not necessary; the party condemned being put in default by the mere lapse of the 15 days.

2. That under art. 479 of the Code of C. P., where the prothonotary or his deputy has taxed the costs, without previous notice to the attorneys of the parties in the case, an opposition *afin d'annuler* on the ground merely of want of notice will not be maintained, unless the opposant shows that he has been prejudiced by the want of notice. *Samuel et al. v. Houlston et vir*, Mathieu, J., Nov. 20, 1885.

* To appear in Montreal Law Reports, 1 S. C.

Cautionnement judicatum solvi—Frais encourus et à encourir.

Jugé:—Que lorsque durant l'instance le demandeur laisse la province de Québec, pour résider ailleurs, le défendeur a droit au cautionnement *judicatum solvi*, non seulement pour les frais à encourir mais également pour tous les frais encourus.—*Gauthier v. Dupras et al.*, Mathieu, J., 4 nov., 1885.

Vente judiciaire d'immeubles—Opposition—Description—Tenants et aboutissants.

Jugé:—Que pour la vente judiciaire de partie d'un immeuble portant un numéro officiel, il est nécessaire dans les annonces d'indiquer les tenants et aboutissants. (Article 2168, C.C.)—*Cité de Montréal v. Lionais & Lionais*, optt., Caron, J., 31 janvier 1881.

SUPERIOR COURT.

MONTREAL, Dec. 9, 1885.

Before MOUSSEAU, J.

CORISTINE et al. v. LIZOTTE.

Procedure—Amendment of Pleadings—Costs.

The plaintiffs sued defendant, P. N. Lizotte, and Dame Cecile Plante, his wife, as *communs en biens*, trading together and joint and several makers of the promissory note declared on.

The female defendant pleaded that she signed the note as *garant* for her husband, and was not liable. The case was inscribed for hearing at *enquête* and merits for 1st Dec., 1885, when the female defendant (7th Dec.) presented a motion setting forth that by a judgment of the Superior Court of 22nd April, 1885, separation of property had been granted her from her husband; that on the 18th Nov., 1885, she had renounced the said community of property, and praying that she be allowed to file an additional plea setting up the foregoing.

The plaintiffs' attorneys resisted this motion on the ground that such motion should have been made before the issues were completed; that the defendant had plenty of time between the 22nd April and the date of inscription to make such motion, but had not availed herself thereof; that no affidavit nor such additional plea accompanied said motion, nor were any exhibits, copies of judg-

ment or renunciation produced by female defendant with the said motion, and that under the holding in *Ducharme v. Etienne*, 1 Leg. News, 281, such a judgment and renunciation could not affect the right of the parties acquired anterior to the institution of the action *en séparation de biens*, and at all events plaintiffs should have full costs and costs of motion.

The Court gave judgment granting female defendant's motion without costs and without costs of motion.

Dunlop & Lyman for plaintiffs.

David & Laurendeau for defendant.

(F.S.L.)

SUPREME COURT OF CANADA.

Stock held in trust—Mandatory.—S. brought an action against the Bank of Montreal to recover the value of stock in the Montreal Rolling Mills Company, transferred to the Bank under the following circumstances;—S.'s money was originally sent out from England to J. R., at Montreal, to be invested in Canada for her. J. R. subscribed for a certain amount of stock in the Montreal Rolling Mills Company as follows: 'J. Rose, in trust,' without naming for whom, and paid for it with S.'s money. He sent over the certificate of stock to S., and subsequently paid her the dividends he received on the stock. Becoming indebted to the Bank of Montreal, R. transferred to the manager of the Bank, as security for his indebtedness, some 350 shares of the Montreal Rolling Mills Company, including the shares bought for S., and the transfer showed on its face that he held the latter shares 'in trust.' The Bank of Montreal then received the dividends credited by them to J. R. who paid them to S. J. R. subsequently became insolvent, and S. not receiving dividends sued the bank for an account.

Held, reversing the judgment of the Court of Queen's Bench, Montreal (Strong, J., dissenting), that there was sufficient to show that J. R. was acting as agent or mandatory of S., and the Bank of Montreal not having shown that J. R. had authority to sell or pledge the stock, S. was entitled to get an account from the Bank.—*Sweeney v. Bank of Montreal*.

W. H. Kerr, Q.C., for the Appellant.

Lafamme, Q.C., and *Robertson, Q.C.*, for the Respondent.

THE QUEEN v. RIEL.

[Continued from p. 400.]

Mr. Justice Taylor's conclusion is: "After a critical examination of the evidence, I find it impossible to come to any other conclusion than that at which the jury arrived. The appellant is, beyond all doubt, a man of inordinate vanity, excitable, irritable, and impatient of contradiction. He seems to have at times acted in an extraordinary manner: to have said many strange things, and to have entertained, or at least professed to entertain, absurd views on religious and political subjects. But it all stops far short of establishing such unsoundness of mind as would render him irresponsible, not accountable for his actions. His course of conduct indeed shows, in many ways, that the whole of his apparently extraordinary conduct, his claims to Divine inspiration and the prophetic character, was only part of a cunningly devised scheme to gain, and hold, influence and power over the simple-minded people around him, and to secure personal immunity in the event of his ever being called to account for his actions. He seems to have had in view, while professing to champion the interests of the Metis, the securing of pecuniary advantage for himself."

And he adds, after reviewing the evidence: "Certainly the evidence entirely fails to relieve the appellant from responsibility for his conduct, if the rule laid down by the judges in reply to a question put to them by the House of Lords in *MacNaghten's case*, 10 Cl. & Fin. 200, be the sound one."

Mr. Justice Killam says: "I have read very carefully the report of the charge of the Magistrate, and it appears to have been so clearly put that the jury could have no doubt of their duty in case they thought the prisoner insane when he committed the acts in question. They could not have listened to that charge without understanding fully that to bring in a verdict of guilty was to declare emphatically their disbelief in the insanity of the prisoner."

And again: "In my opinion, the evidence was such that the jury would not have been justified in any other verdict than

"that which they gave. * * * I hesitate to add anything to the remarks of my brother Taylor upon the evidence on the question of insanity. I have read over very carefully all the evidence that was laid before the jury, and I could say nothing that would more fully express the opinions I have formed from its perusal than what is expressed by him. I agree with him also in saying that the prisoner has been ably and zealously defended, and that nothing that could assist his case appears to have been left untouched."

The organization and direction of such a movement is in itself irreconcilable with this defence; and the admitted facts appear wholly to displace it. The prisoner, eight months before this rebellion broke out, was living in the United States, where he had become naturalized under their laws, and was occupied as a school teacher. He was solicited to come, it is said, by a deputation of prominent men among the French half-breeds, who went to him from the North-West Territories, and, after a conference, requested him to return with them, and assist in obtaining certain rights which they claimed from the Dominion Government, and the redress of certain alleged grievances. He arrived in the Territories in July, 1884, and for a period of eight months was actively engaged in discussing, both publicly and privately, the matters for which he had come, addressing many public meetings upon them in a settlement composed of about six hundred French and a larger number of English half-breeds, together with others. The English half-breeds and other settlers observed his course, and saw reason to fear the outbreak which followed; but the suggestion of insanity never occurred, either to those who dreaded his influence in public matters over his race, and would have been glad to counteract it, or to the many hundreds who unhappily listened to him and were guided by his evil counsels to their ruin.

If, up to the eve of the resort to arms, his sanity was open to question, it is unaccountable that no one, either among his followers or his opponents, should have called public attention to it. If the Government had then attempted to place him under restraint as a

lunatic, it is believed that no one would have been found to justify their action, and that those who now assert him to have been irresponsible would have been loud and well warranted in their protest. It may be well also to call attention to the obvious inconsistency of those persons—not a few—who have urged the alleged mal-administration of the affairs of the North-West Territories by the Government as a ground for interfering with the sentence, without ceasing to insist upon the plea of insanity. The prisoner cannot have been entitled to consideration both as the patriotic representative of his race and an irresponsible lunatic. It may be asked, too, if the leader was insane, upon what fair ground those who were persuaded by and followed him could be held responsible; and if not, who could have been punished for crimes which so unquestionably called for it.

It has been urged, however, that his nature was excitable, and his mental balance uncertain; that as the agitation increased, his natural disposition overcame him, and that the resort to violence was the result of overwrought feeling, ending in insanity, for which he cannot fairly be held accountable—that, in short, he was overcome by events not foreseen or intended by him.

A simple statement of the facts will show that this view is wholly without foundation; that throughout he controlled and created the events, and was the leader, not the follower; and that the resort to armed violence was designed and carried out by him deliberately, and with a premeditation which leaves no room whatever for this plea.

The first collision with the troops occurred at Duck Lake on the 26th of March, 1885.

On the 3rd of March previous the prisoner was at a meeting where there were about sixty of his followers, nearly all armed. He spoke at that meeting, and said that the police wanted to arrest him. "But these," he said, "are the real police," pointing to those present. On the 5th he told Charles Nolin that he had decided to induce the people to take up arms, and he had begun to speak to him of doing so as early as December previous.

On the 17th of March he said to Dr. G. Willoughby, sixty or seventy armed half-

breeds being present, that they intended to strike a blow to assert their rights; and, pointing to the men, "You see now I have my police. In one week that little Government police will be wiped out of existence." He added that the time had come when he was to rule this country or perish in the attempt, and that the rebellion of fifteen years ago (in which he had also been the leader) "would not be a patch upon this one."

To Mr. Lash, whom, on the 18th of March, at the head of his armed followers, he arrested, he said that the rebellion had commenced, and they intended to fight until the whole of the Saskatchewan Valley was in their hands; that he had been waiting fifteen years, and at last his opportunity had come; and that he would give the police every opportunity to surrender, but if they did not do so there would be bloodshed.

On the same day he, with about fifty armed followers, came to the stores of the witnesses Kerr and Walters, and demanded the arms and ammunition, the removal of which he superintended.

On the 20th he said to Thomas McKay that this was Major Crozier's last opportunity of averting bloodshed, and that, unless he surrendered Fort Carleton, an attack would be made that night.

On the 21st, the prisoner sent a demand, written and signed by himself, to the same Major Crozier, then in command of the Mounted Police at Fort Carleton, demanding an unconditional surrender of the fort and of his force, and threatening a war of extermination on refusal. This demand was not presented as written, because his messenger who carried it, on conferring with Major Crozier's representative, saw that it would be peremptorily rejected.

On the 24th, the prisoner, with a force of between three and four hundred armed men, proceeded to attack the police and the volunteers, on their way from Fort Carleton to Duck Lake, and he himself gave the command to fire, when nine men were killed.

It has been made a question which side fired first on this occasion, but Riel's own statement to Capt. Young was, that they were endeavouring to surround the Government force while Major Crozier was engaged

in a parley with one of Riel's people; and that it was part of his plan to capture the police force, or some high Government official, in order to compel negotiations, has been stated by him to the Rev. Mr. Pitblado and to others, as well as to Capt. Young.

From that time until the suppression of the rebellion by the taking of Batoche, on the 12th of May, he was the unquestioned leader of the movement. Being urged by Mr. Astley, after the second engagement, which took place at Fish Creek, to allow him to negotiate, he said to him, what he also repeated to the witness Ross, that they must have another victory first, when they would be able to make better terms with the Government; and to the end he remained, not merely in the ostensible, but in the actual control of the armed force, negotiating in that capacity with the commander of the troops, and with an authority never doubted by those who, being his prisoners, observed his conduct, or questioned by any one of those in arms under him.

It may be asserted with confidence that there never has been a rebellion more completely dependent upon one man; that had he at any moment so desired, it would have come to an end; and that had he been removed a day before the outbreak, it would, in all probability, never have occurred. A dispassionate perusal of the whole evidence will leave no room for doubt upon this point, and that this was his own opinion appears by his statement to Father André, to be presently referred to.

Finally, under this head, as regards the mental state of the prisoner, after his trial and before execution, careful enquiry was made into this question by medical experts employed confidentially by the Government for that purpose, and nothing was elicited showing any change in his mental powers or casting any doubt upon his perfect knowledge of his crime, or justifying the idea that he had not such mental capacity as to know the nature and quality of the act for which he was convicted, as to know that the act was wrong, and as to be able to control his own conduct.

3. It has been urged that the prisoner's crime was a political one, inspired by politi-

cal motives alone; that a rebellion prompted only for the redress of alleged political grievances differs widely from an ordinary crime, and that, however erroneous may be the judgment of its leader, in endeavouring to redress the supposed wrongs of others, he is entitled, at least, to be regarded as unselfish and, as in his own view, patriotic.

This ground has been most earnestly considered, but the Government has been unable to recognize in the prisoner a political offender only, or to see that upon the evidence there can be any doubt that his motives were mainly selfish. On the contrary, it seems plain that he was willing at any moment, for the sake of gain, to desert his deluded followers, and to abandon his efforts for the redress of their alleged grievances, if, under cover of them, he could have obtained satisfaction for his own personal money demands.

It is believed that many who have espoused his cause and desired to avert from him the sentence which the law pronounced, must have been ignorant of this fact, or cannot duly have considered its proper effect, for it seems incredible that any one knowing it could regard the prisoner as entitled to the character of a patriot, or adopt him as the representative of an honorable race.

It is to be remembered that the prisoner had left this country and gone to the United States, where he had become an American citizen. He was brought here, therefore, avowedly to represent the claims of others, although in his letter of acceptance to the delegates he mentioned his own grievances as enabling him to make common cause with them. It is clear, however, from the evidence of Dr. Willoughby and Mr. Astley, that from the beginning, his own demand, which he himself claimed against the Government, was uppermost in his thoughts, and as early as December he attempted to make a direct bargain with the Government for its satisfaction.

Father André was a witness called on behalf of the prisoner, and there can be no reason whatever to question the correctness of his statement. His evidence on cross-examination by Mr. Casgrain was as follows:

"Q. I believe in the month of December, 1884, you

"had an interview with Riel and Nolin, with regard to a certain sum of money which the prisoner claimed from the Federal Government?"

"A. Not with Nolin. Nolin was not present at the interview."

"Q. The prisoner was there?"

"A. Yes."

"Q. Will you please state what the prisoner asked of the Federal Government?"

"A. I had two interviews with the prisoner on that subject."

"Q. The prisoner claimed a certain indemnity from the Federal Government, didn't he?"

"A. When the prisoner made his claim I was there with another gentleman, and he asked from the Government \$100,000. We thought that was exorbitant, and the prisoner said 'Wait a little; I will take at once \$35,000 cash.'"

"Q. And on that condition the prisoner was to leave the country, if the Government gave him the \$35,000?"

"A. Yes, that was the condition he put."

"Q. When was this?"

"A. This was on the 23rd December, 1884."

"Q. There was also another interview between you and the prisoner?"

"A. There has been about twenty interviews between us."

"Q. He was always after you to ask you to use your influence with the Federal Government to obtain this indemnity?"

"A. The first time he spoke of it was on the 12th December. He had never spoken a word about it before, and on the 23rd of December he spoke about it again."

"Q. He talked about it very frequently?"

"A. On these two occasions only."

"Q. That was his great occupation?"

"A. Yes, at those times."

"Q. Is it not true that the prisoner told you he himself was the half-breed question?"

"A. He did not say so in express terms, but he conveyed that idea. He said: 'If I am satisfied, the half-breeds will be.' I must explain this. This objection was made to him, that even if the Government granted him the \$35,000, the half-breed question would remain the same, and he said, in answer to that: 'If I am satisfied, the half-breeds will be.'"

"Q. Is it not a fact he told you he would even accept a less sum than the \$35,000?"

"A. Yes. He said: 'Use all the influence you can; you may not get all that, but get all you can, and if you get less we will see.'"

This evidence confirms that of Charles Nolin, a very prominent half-breed, at one time Minister of Agriculture in the Government of Manitoba, who had strongly sympathized with Riel and the movement, until armed rebellion became imminent, when he separated from him, and afterwards gave evidence for the Crown. This was his testimony:

"In the beginning of December, 1884, he began to

"show a desire to have money; he spoke to me about it first, I think."

"Q. How much did he say he wanted?"

"A. The first time he spoke of money I think he said he wanted \$10,000 or \$15,000."

"Q. From whom would he get the money?"

"A. The first time he spoke about it he did not know any particular plan to get it; at the same time, he told me that he wanted to claim an indemnity from the Canadian Government. He said that the Canadian Government owed him about \$100,000, and then the question arose who the persons were whom he would have to talk to the Government about the indemnity. Some time after that, the prisoner told me that he had an interview with Father André, and that he had made peace with the Church; that since his arrival in the country he had tried to separate the people from the clergy; that until that time he was at open war almost with the clergy. He said that he went to the church with Father André, and in the presence of another priest and the Blessed Sacrament he had made peace, and said that he would never again do anything against the clergy. Father André told him he would use his influence with the Government to obtain for him \$35,000. He said that he would be contented with \$35,000 then, and that he would settle with the Government himself for the balance of the \$100,000. That agreement took place at Prince Albert. The agreement took place at St. Laurent, and then Father André went back to his mission at Prince Albert."

"Q. Before December were there meetings at which Riel spoke, and at which you were present?"

"A. Yes."

"Q. How many?"

"A. Till the 24th February. I assisted at seven meetings, to the best of my knowledge."

"Q. Did the prisoner tell you what he would do if the Government paid him the indemnity in question?"

"A. Yes."

"Q. What did he tell you?"

"A. He said if he got the money he wanted from the Government, he would go wherever the Government wished to send him. He had told that to Father André. If he was an embarrassment to the Government by remaining in the North-West he would even go to the Province of Quebec. He said also that if he got the money he would go to the United States and start a paper, and raise the other nationalities in the States. He said: 'Before the grass is that high in this country, you will see foreign armies in this country.' He said 'I will commence by destroying Manitoba, and then I will come and destroy the North-West and take possession of the North-West.'"

Much has been made of the argument that the prisoner came here at the request of others, but for which he would have remained away, and that being here he desired to return to the United States, and would have done so were it not for the urgency of those who had induced him to come. As to this, Charles Nolin swore as follows:—

"Q. Was there a meeting about that time, about the 8th or 24th of February?"

"A. A meeting?"

"Q. At which the prisoner spoke?"

"A. There was a meeting on the 24th of February, when the prisoner was present."

"Q. What took place at that meeting; did the prisoner say anything about his departing for the United States?"

"A. Yes."

"Q. What did the prisoner tell you about that?"

"A. He told me that it would be well to try and make it appear as if they wanted to stop him going to the States. Five or six persons were appointed to go among the people, and when Riel's going away was spoken about, the people were to say 'No, No.' It was expected that Gagnon would be there, but he was not there. Riel never had any intention of leaving the country."

"Q. Who instructed the people to do that?"

"A. Riel suggested that himself."

"Q. Was that put in practice?"

"A. Yes."

The counsel for the other half-breeds who pleaded guilty also stated in court that Riel had himself procured the request to him to come to this country; and on two occasions in court these learned gentlemen most earnestly and indignantly denounced the prisoner as one who had misled and deceived their clients, and to whom all the misery and ruin which this unhappy rebellion had brought upon them was to be attributed.

But if an unselfish desire could be credited to the prisoner to redress political wrongs even by armed rebellion, it would at least have been necessary to disprove the charge which lies against him, that in his own mind the claims of humanity had no place, but that he was prepared to carry out his designs by bringing upon an unoffending people all the horrors of an Indian rising, with the outrages and atrocities which, as he knew full well, must inevitably accompany it. That this cannot be disproved, but that it is beyond all dispute true, the evidence makes plain.

From the beginning, even before Duck Lake, he was found in company with Indians armed, and to the end he availed himself of their assistance.

In that engagement, the first occasion of bloodshed, according to the evidence of the witnesses Astley, Ross and William Tompkins, the Indians composed a large portion of his force—one-third, or thereabouts.

In a letter found in the camp of Poundmaker, an Indian Chief, in the prisoner's handwriting, and signed by him, after describing in most exaggerated language what is termed their victory at Duck Lake, it is said: "Praise God for the success He has given us. Capture all the police you possibly can. Preserve their arms. Take Fort Battle, but save the provisions, munitions and arms. Send a detachment to us of at least one hundred men."

In a draft letter, also in his handwriting, and proved at the trial, addressed to the French and English Métis from Battle River to Fort Pitt, the following expressions are found:—

"We will help you to take Fort Battle and Fort Pitt. * * * Try and have the news which we send to you conveyed as soon as possible to the Métis and Indians of Fort Pitt. Tell them to be on their guard; to prepare themselves for everything. * * * Take with you the Indians; gather them together everywhere. Take all the ammunition you can, in whatever stores they may be. Murmur, growl and threaten. Rouse up the Indians."

Other evidence to the same effect was given at the trial, and it may be added that in the scouting reports and orders-in-council the active employment of Indians in carrying on hostilities clearly appears.

It could not be overlooked either, upon an application for executive clemency, that upon the trials of One Arrow, Poundmaker, White Cap and other Indians, it was apparent that they were excited to the acts of rebellion by the prisoner and his emissaries. Many of these Indians so incited and acting with him from the commencement were refugee Sioux from the United States, said to have been concerned in the Minnesota massacre and the Custer affair, and therefore of a most dangerous class.

It is to the credit of the Indian chiefs that their influence was used to prevent barbarity, but by individuals among them several cold-blooded, deliberate murders were committed, for which the perpetrators now lie under sentence of death. These crimes took place during the rebellion, and can be attributed only to the excitement arising out of it.

4. Whether rebellion alone should be punished with death is a question upon which opinions may differ. Treason will probably ever remain what it always has been among civilized nations, the highest of all crimes; but each conviction for that offence must be treated and disposed of by the Executive Government upon its own merits, and with a full consideration of all the attendant circumstances. In this particular instance, it was a second offence and, as on the first occasion, accompanied by bloodshed under the direct and immediate order of the prisoner, and by the atrocity of attempting to incite an Indian warfare, the possible results of which the prisoner could and did thoroughly appreciate. In deciding upon the application for the commutation of the sentence passed upon the prisoner, the Government were obliged to keep in view the need of exemplary and deterrent punishment for crime committed in a country situated in regard to settlement and population as are the Northwest Territories; the isolation and defenceless position of the settlers already there; the horrors to which they would be exposed in the event of an Indian outbreak; the effect upon intending settlers of any weakness in the administration of the law; and the consequences which much follow in such a country if it came to be believed that such crimes as Riel's could be committed, without incurring the extreme penalty of the law, by any one who was either subject to delusions, or could lead people to believe that he was so subject. The crime of the prisoner was no constructive treason; it was accompanied by much bloodshed, inflicted by his own direct orders; and the Government have felt, upon a full and most earnest consideration of the case, that they would have been unworthy of the power with which they are entrusted by the whole people, and would have neglected their plain duty to all classes, had they interfered with the due execution of a sentence pronounced as the result of a just verdict, and sanctioned by a righteous law.

A. CAMPBELL,

(Minister of Justice during the proceedings against Riel.)

OTTAWA, Nov. 25, 1885.

The Legal News.

VOL. VIII. DECEMBER 26, 1885. No. 52.

The decision of the Judicial Committee of the Privy Council on the validity of the Liquor License Act, 1883, which was submitted to it (*ante* p. 379), maintains the right of the Provincial Legislatures to deal with the subject of licenses for the sale of liquors. The precise terms of the report of their lordships have not yet been made known.

The newly elected House of Commons, with its strange complexion, is not devoid of persons learned in the law; the members of the legal profession, in fact, are in greater force than ever. Among the successful candidates are 137 barristers and 18 solicitors. Of the barristers 29 are Queen's Counsel. The intelligent elector has even descended to the student ranks, and sent two gentlemen to the Legislature, who have not yet completed their studies, but who, like their fully fledged brethren, have already made profession of a political faith, one being elected as a liberal, and the other as a conservative.

The celebrated cabman's case, *Reg. v. Ashwell*, noticed (without the title being stated) on pages 105, 122 and 177 of this volume, has just come to a most unsatisfactory conclusion in the Court for the Consideration of Crown Cases Reserved. The case was argued before fourteen judges, and they stand seven to seven! So the result is that the motion to quash the conviction is negatived. In other words, the opinion of Mr. Justice Denman, upon whose direction the jury convicted the prisoner, is untouched. Our London contemporary, the *Law Journal*, refers to this case as a proof of the uselessness of the Court, and says its continued existence "is a part of the blunder committed in 1873, when it was supposed that criminal cases were not proper to be taken to the highest Courts of Appeal. They are the very cases (adds the *Law Journal*) which ought to be so taken, because they are the most important of all cases, and because, from

judges sitting alone to try them without a regular appeal, a divergence of opinion is apt to spring up on questions of law upon which uniformity is absolutely essential."

Sir Henry Charles Lopes, who recently tried the case of *Reg. v. Jarrett*, has been appointed a Lord Justice of Appeal in the place of Sir Richard Baggallay resigned. The new Lord Justice, who is the third son of the late Sir Ralph Lopes, was born October 3, 1827. He was educated at Winchester and Balliol College, Oxford, where he graduated B.A. in 1853. The learned judge was called to the bar at the Inner Temple in 1852, went the Western Circuit, and was made a Queen's Counsel in 1869. He held the appointment of Recorder of Exeter from May, 1867, until November, 1876, and he represented Launceston in the Conservative interest from April, 1868, to February, 1874, when he was returned for Frome, which place he continued to represent until November, 1876, when he was appointed a Judge of the Common Pleas Division.

THE MONTREAL LAW REPORTS FOR DECEMBER.

The Montreal Law Reports for the present month include pp. 480 to 512 of the Queen's Bench Series, and also pp. 480 to 512 of the Superior Court Series. These issues bring the 1885 volume of each series to a close.

In the Superior Court series, the case of *Brunet v. L'Association Pharmaceutique* presented a very interesting question whether a partnership which was illegal under the existing law could entitle the party to rights under a special statute. The judges stand two to two in the lower courts, and it is said the case is to be taken to appeal. In *Cyr v. Bryson* it was held that where the plaintiff has left the jurisdiction while the suit is pending, security for costs may be asked by motion at any time, even after the expiration of four days from the time when the defendant was informed of the departure. In *Legris v. Cornellier*, the necessity of an affidavit in a penal action under the Dominion Election Act was affirmed. In *Lemieux & La Cour des Commissaires, etc.*, the Court held that the erection of a part of a parish

into a town does not take away the jurisdiction of the Commissioners' Court, previously established in such parish, over the same territory. The judgment in this case, which conflicts with a previous decision by another judge of the same court, is carefully elaborated. In *Samuel v. Houston* an important question of procedure came up. Is notice to the parties necessary before costs are taxed? We are disposed to think that the rule should require notice. But Art. 479 of the Code does not say so, and the Judge held that unless the party shows he has been prejudiced by the absence of notice he cannot oppose the execution on this ground. In *Gauthier v. Dupras* the Court held that where the plaintiff has left the country during the suit, the defendant is entitled to ask for security not only for the costs to be incurred, but for those already incurred. An abstract of the Queen's Bench series for December is given below.

COURT OF QUEEN'S BENCH— MONTREAL.*

Appeal to the Supreme Court—Injunction.

HELD:—That no appeal lies to the Supreme Court from a judgment in appeal confirming a judgment of the Superior Court granting an injunction, but reserving to adjudicate as to the amount of damages until after an account had been rendered.—*Whitehead et al., Appellants, and White, Respondent.* In Chambers, Dorion, C.J., Oct. 15, 1885.

Curateur à Substitution—Responsabilité et pouvoirs—C. C. 931—Intérêts des intérêts—Prescription des intérêts échus avant et après la mise en force du Code—C. C. 2250, 2270.

JUGÉ:—1o. Que le curateur à une substitution n'a aucun droit de recevoir les capitaux appartenant à cette substitution, et dont il doit être fait emploi conformément à l'art. 931 du Code Civil.

2o. Qu'un tel curateur n'a pas non plus le droit de réclamer les intérêts de ces sommes capitales, ces intérêts étant dus aux grevés de substitution.

3o. Que l'appelant, n'ayant reçu les deniers

appartenant à la dite substitution que comme procureur des grevés, et simple *negotiorum gestor*, il n'était pas tenu de payer les intérêts des intérêts des sommes par lui reçues si ce n'est depuis la demande qui en a été faite par l'intervention produite par l'intimé; l'obligation de payer les intérêts des intérêts n'incombant qu'à ceux qui reçoivent des deniers pour des incapables.

4o. Qu'en vertu des articles 2250 et 2270 du Code Civil les intérêts échus avant le 1er août 1886, date de la mise en force du Code, ne se prescrivent que par trente ans, et que ceux échus depuis cette date, et dont la prescription n'a commencé à courir que depuis la mise en force du Code, se prescrivent par cinq ans.—*Dorion, appellant, et Dorion, intimé.* Dorion, C. J., Ramsay, Tessier, Cross, Baby, J.J., 26 mai 1885.

Sale—Misrepresentation as to part of thing sold—Damages.

The appellant sold to the respondent his assets, stock-in-trade, machinery and patents, by an agreement of which the material words are as follows:—"John Tye... hereby agrees "to transfer and assign all his right and interest in the assets and stock-in-trade and "machinery of the business carried on by "him in Toronto and Montreal, under the "name of John Tye & Co., otherwise called "the Dominion Wire Mattress Company, to "Warren T. Fairman, and also all the patents "used by said Tye in connection with said "business... The consideration of this transfer is \$4,000, of which \$2,000 are to be paid "in cash, \$500 in three months, \$500 in six "months, \$500 in nine months, and \$500 in "twelve months from this date, in notes of "W. T. Fairman... If on stock-taking, which "shall be taken within one week, it is found "that \$4,000 is not the exact valuation of the "property transferred, the parties shall regulate the deficiency or excess as follows: "..." if less than \$4,000 then the deficiency "shall be deducted from the cash payment "of \$2,000." And in a postscript it was stated that Tye "transfers to said Fairman the good "will of said business." On getting possession Fairman found that there was no existing patent in Canada for the process of wire

*To appear in Montreal Law Reports 1 Q. B.

coiling handed over to him by Tye in execution of the agreement, and that no patent could be obtained for it in Canada, inasmuch as application had not been made within a year from the date of the patent obtained in the United States. The stock-taking showed the value of machinery and plant to be \$1,920.89, leaving over \$2,000 to represent the value of the patents, or of the patents and good will.

Held:—That the sale should not be regarded as a sale *en bloc*, and that there being deception and misrepresentation as regards the patents, which were in fact worthless, the purchaser was entitled to damages, the measure of which might be taken as the \$2,000 allowed for the patents,—the good will having been added as a separate memorandum and nothing having been allowed as a consideration therefor.—*Tye*, appellant, and *Fairman*, respondent. *Monk, Tessier, Cross, Baby, JJ.*, (*Tessier, J. diss.*), May 21, 1885.

Evidence—Valuation—Phosphate Mine—Partnership account.

Held:—That in order to determine, for the winding up of a partnership, the fair cash value of an asset of indefinite value, such as a phosphate mine, the court will have regard to the estimate set upon it by persons experienced in the purchase and sale of mines, rather than to the opinion of witnesses who assign a speculative value to the 'property': and the fact that the mine could not be worked at a profit may also be properly taken into consideration.—*Jones et al.*, appellants, and *Powell*, respondent. *Dorion, C.J.*, *Monk, Cross, Baby, JJ.*, Nov. 27, 1885.

COUR SUPÉRIEURE.

ST-JEAN (Iberville), 11 Novembre 1885.

Coram CHAGNON, J.

MORIER, req., v. CHS. LOUPRET, magistrat, et Rév. A. P. TASSÉ, intimé.

Certiorari—Prohibition—Instance criminelle—Juges de Paix—Récusation.

Jugé:—1o. *Que les dispositions du Code de Procédure Civile indiquant la manière de récuser les juges ne s'appliquent pas aux juges de paix, contre lesquels il n'y a aucune loi qui régle leur récusation.*

2o. *Que la récusation des juges de paix ne peut être obtenue qu'en amenant la cause sous la juridiction de la Cour Supérieure par un bref de certiorari ou par un bref de prohibition.*

3o. *Que pour que la récusation soit obtenue il faut faire la preuve par écrit des faits de récusation reprochés, la preuve par témoins n'étant pas admise; et que l'affidavit de circonstances dans un certiorari n'est pas une preuve suffisante.*

4o. *Que la loi du pays exige pour qu'un cimetière puisse être établi dans une paroisse, que l'autorité religieuse ou ecclésiastique concoure avec l'autorité civile; sans le décret de l'évêque ordonnant l'établissement du cimetière, il ne peut y avoir de cimetière.*

PER CURIAM. Les raisons que le requérant allègue dans son affidavit de circonstances, pour faire annuler la conviction prononcée contre lui par le Magistrat de district, sont au nombre de deux.

La première invoque le fait que le Magistrat de district aurait été récusé par écrit par le requérant, qu'il aurait refusé de faire la déclaration si, oui ou non, les faits mentionnés dans cette récusation étaient vrais et qu'il aurait refusé de recevoir la preuve légale des faits faisant la base de cette récusation.

Les faits sur lesquels s'appuie la récusation sont que le Magistrat de district avait donné conseil sur le différend et qu'il avait ouvert son avis hors de l'instance et jugement.

Le magistrat de district a renvoyé cette récusation, prétendant ne pas reconnaître le mode de récusation adopté par les défendeurs et déclarant la dite récusation, mal fondée en loi.

Si le mode adopté par les défendeurs pour faire cette récusation est réellement celui qui doit être suivi, la loi devrait alors nécessairement pourvoir à un mode correspondant, de faire juger cette récusation. Il n'y a aucun doute que ce n'est pas le juge recusé qui peut adjuger sur cette récusation. Il peut bien déclarer si les faits sur lesquels reposent cette récusation sont vrais ou faux; mais s'il ne juge pas à propos de faire cette déclaration, soit parcequ'il considère que cette récusation ne constitue qu'une injure à son adresse ou pour quelque autre motif, la loi devrait cependant pourvoir à un mode d'amener la récusation.

tion devant un autre juge, afin d'y adjuger.

Le Code de Procédure Civile a des dispositions spéciales concernant la manière de récuser les juges au civil et d'adjuger sur ces récusations. Voir art. 176 et suivants du Code de Procédure.

L'art. 124 de ce code dit qu'aussitôt que la récusation est communiquée au juge il doit déclarer par écrit si les faits sont véritables ou non. S'il déclare que les faits de récusation ne sont pas vrais, il faut alors une preuve écrite des faits de récusation reprochés, pour faire déclarer la récusation valable; la preuve par témoins n'est pas admise.

Mais, dans le cas où une telle déclaration n'est pas faite et où cependant la partie récusante veut procéder sur sa récusation, les règles sanctionnées par le Code de Procédure pourvoient à ce que le juge recusé renvoie la cause devant un autre juge, aux fins d'y faire donner une adjudication.

Mais ces dispositions de la loi ne s'appliquent point aux juges de paix, siégeant dans les affaires pénales ou criminelles: et il est de fait qu'il n'y a aucun mode spécial pourvu par la loi, pour décider d'une récusation faite d'un juge siégeant au criminel ou dans des matières pénales.

Il ne resterait donc dans ce cas que le bref de prohibition, qui lui, aurait l'effet d'amener la cause et la récusation devant un autre juge, lequel adjugera alors sur la récusation.

Paley dit que quand à raison des relations du juge de paix, avec les parties et de son intérêt dans la cause, sa qualité de juge impartial ou intègre peut être soupçonnée, il est du devoir de ce juge de s'abstenir de siéger; mais s'il ne s'abstient pas, la partie peut alors avoir recours au bref de prohibition ou au bref d'erreur pour faire prononcer sur les causes de reproche. Le bref de *certiorari* peut être joint au bref ci-dessus pour obtenir le renvoi des papiers appartenant à la cause, de la juridiction inférieure devant la juridiction supérieure.

De cette manière, quoiqu'il y ait défaut de dispositions législatives spéciales sur ce sujet, la partie recusée trouve un autre juge pour adjuger sur cette récusation. Et devant ce nouveau juge, la partie récusante fait alors preuve par témoins ou par écrit suivant le cas des faits de sa récusation.

Dans la cause de *Molleur & Loupret* rapportée au 8ème volume du *Legal News*, pp. 305 et 306, un bref de prohibition avait été pris, alléguant l'inimitié du juge de paix avec l'accusé, et M. le juge Torrance disait dans cette cause: "The rules of our Civil Code of Procedure were referred to by counsel, as to recusation of a judge. These are not binding on the court in this case apart from their wisdom, but it is significant that as a rule for the judges of this Court when there is no written proof of the ground of recusation, the declaration by the judge is conclusive, etc., etc."

Dans la cause de *Prud'homme & Masson*, dans laquelle on m'a fourni le *factum* des appels avec le jugement rendu par le juge Mackay (lequel jugement m'a-t-on dit, a été confirmé par la Cour d'Appel,) on avait pris un bref *quo warranto*, et on alléguait dans la requête annexée à ce bref que les commissaires nommés étaient intéressés et avaient ouvert leur avis hors de l'instance et jugement; le tribunal a considéré que les requérants n'avaient pas fait preuve suffisante de leurs allégués à cet égard.

Je crois donc que le seul mode qui puisse être adopté pour se prévaloir des faits et reproches qui peuvent rendre un juge de Paix inhabile ou incompetent à exercer ses fonctions est non pas le rouage énoncé au Code de Procédure Civile, mais le bref de prohibition qui a pour effet direct de trouver un autre tribunal ou un autre juge pour adjuger sur les faits de récusation.

Je crois que dans une matière destinée à être jugée sommairement par un juge de Paix, le bref de *certiorari* ne pouvait être employé, mais le bref de Prohibition offre le plein recours désiré.

D'ailleurs en supposant que le Bref de *certiorari*, qui est aussi un bref de prérogative, pouvait être employé aux mêmes fins, ce qui est possible, il faudrait toujours que devant le tribunal ou le juge, chargé de casser, s'il y a lieu la conviction ou sentence, on fit le même genre de preuve des faits de la récusation qu'on pourrait être appelé à faire sur un bref de prohibition.

La partie récusante, soit sur une simple récusation en vertu des art. 176 et suivants du Code de Procédure Civile, soit sur un bref

de prohibition, ne pouvait prouver les faits de récusation par son propre et unique serment, elle est obligée de faire preuve du fait reproché, soit par écrit soit par témoins suivant le cas. Or, si l'on juge que l'on peut se servir pour ces fins, du bref de Certiorari, une preuve aussi ample devrait être faite sur ce bref que sur les autres procédures plus haut indiquées.

Il n'en est pas de la récusation comme des autres faits se rattachant à une cause amenée devant le tribunal par voie du bref de certiorari.

L'affidavit des circonstances dans les cas ordinaires fait foi, de ce qu'il dit, tant qu'il n'est pas contredit; mais si on juge à propos d'utiliser ce bref pour reprocher un juge pour montrer qu'il y avait une cause valable de récusation dans sa personne, il faut que ces faits et reproches ainsi allégués dans l'affidavit de la partie condamnée, soient prouvés et cela par des affidavits de personnes autres que la partie récusante; comme la chose doit se faire dans les autres genres de procédures adoptés pour la même fin.

Dans le cas actuel, le requérant seul assermente le fait reproché et il le fait en outre dans des termes aussi généraux que les contient la récusation. Il eût fallu des affidavits spéciaux constatant ce qu'avait pu dire le magistrat en rapport avec le prétendu avis qu'il avait donné, afin que la partie adverse informée de la circonstance et de l'époque où tel prétendu avis avait été ainsi donné, pût contredire le déposant et afin que la Cour pût être elle-même en mesure d'apprécier les paroles attribuées au Magistrat et de voir si ces paroles avaient réellement pu placer ce Magistrat dans la catégorie des juges récusables.

L'affidavit de circonstances, dit que le juge de paix siégeant a refusé de recevoir la preuve légale des faits qui servent de base à la récusation. Or, ce n'était pas à lui à recevoir cette preuve; c'était à un autre juge chargé d'adjuger sur la récusation.

L'affidavit de circonstances dit que lorsque le magistrat a refusé de recevoir cette preuve, il a déclaré à l'audience *en substance*, qu'en effet, il avait donné conseil sur le différend, qu'il avait ouvert son avis hors de l'instance et jugement.

Je dirai d'abord que cet allégué dans l'affidavit de circonstances de ce qu'a dit le magistrat sur le Banc, lorsqu'il a refusé de recevoir la preuve des faits de récusation, est contredit par la minute même des procédés du magistrat ou en d'autres termes par le record du magistrat, lequel ne mentionne que le fait que la récusation a été renvoyée parce que le Magistrat ne reconnaissait pas le mode de récusation adopté et parce qu'il a considéré telle récusation non fondée en loi. Or, le requérant ne pouvait pas contredire une matière de record de cette espèce par une simple affirmation d'une personne présente à l'audience, même assermentée.

Ensuite, j'ajouterai que le juge de paix aurait pu en effet, alors qu'il était à recevoir la plainte, se faire expliquer par le plaignant tous les faits se rattachant à l'offense, et c'était même son devoir d'avoir une explication de tous ces faits avant de rédiger la plainte et là, il aurait bien pu dire sans devenir sujet à récusation "pour que l'offense soit considérée avoir été commise, il faut que vous, plaignant, ayez été dans telles et telles conditions; si vous avez été dans ces conditions-là, l'offense mentionnée dans le statut s'appliquerait les faits que vous mentionnez, vous pouvez alors à votre cas et en prouvant tous obtenir une conviction contre le prisonnier.

Est-ce là l'avis que le Magistrat a pu donner, et dont parle en termes généraux l'affidavit? Si c'est un autre avis qu'il a donné, avis qui pouvait avoir pour effet d'attaquer sa qualité de juge intègre et impartial, des affidavits spéciaux auraient dû en faire connaître les détails; des affidavits auraient dû préciser les conseils que le juge avait donnés sur le différend, afin que la Cour pût leur donner une interprétation, en rapport avec la loi régissant les causes de disqualification ou de récusation des juges.

Je considère donc que la récusation telle que faite contre le juge de Paix dans le cas actuel et telle qu'elle sert de base, d'après l'affidavit, à la demande de cassation de cette conviction, n'était pas, comme l'a dit le magistrat du district, une récusation fondée en loi, en ce que le mode adopté n'était pas celui reconnu par la loi dans ces sortes d'instance, et que par conséquent le requérant ne pouvait demander la cassation de la conviction

pour la raison alléguée dans l'affidavit à l'effet que le juge de Paix n'y aurait eu aucun égard; et je suis d'avis de plus que le requérant eût-il pu utiliser le bref de *certiorari* pour arguer des faits eux-mêmes qui eussent pu servir de base à une récusation, eût dû tout au moins faire la preuve comme dans les cas ordinaires et non pas se contenter de les affirmer d'une manière générale, dans les termes mêmes du Code de Procédure Civile, et sous son seul et unique serment.

Le second moyen invoqué par le requérant est que sa défense a mis en question des titres de propriété et de possession, et que le magistrat était en conséquence sans juridiction pour en décider et devait s'abstenir.

Il me semble d'abord, que le magistrat n'avait dans l'espèce aucune adjudication à donner sur les titres des propriétés invoqués, car, tous les deux, le plaignant et les défendeurs admettent par leur procédure, que le droit à la propriété était logé non pas chez le plaignant mais chez l'Euvre et Fabrique de St-Cyprien.

Le plaignant, tout en admettant dans sa dénonciation le droit de la Fabrique à la propriété même des lieux, se base sur son occupation et possession de la clôture qui a été brisée et détruite par le requérant.

Le juge de Paix pouvait certainement s'enquérir de l'occupation et de la possession alléguées. Le plaignant pouvait être possesseur et occupant pour avoir loué lui-même le terrain de la Fabrique, ou par l'effet d'un acquiescement tacite de la part de cette dernière, à l'occupation et possession par le plaignant, de cette clôture et du terrain sur lequel elle était construite.

Or, une enquête sur cette question de possession et d'occupation actuelle des lieux soit par le plaignant soit par la Fabrique était dans les limites de la juridiction du magistrat; et il faut croire qu'il a trouvé l'occupation et la possession du plaignant suffisamment prouvée, puisqu'il a condamné le requérant à l'amende.

Mais, le requérant dit: j'avais couleur de droit ou droit plausible d'entrer sur cette propriété et de démolir la clôture comme je l'ai fait, parce que dans une assemblée de paroisse dûment convoquée et tenue le 29 mars 1885, il a été résolu que "le terrain adjacent

au cimetière actuel (je me sers des mots mêmes de la résolution) soit employé à l'agrandissement du dit cimetière."

Mais quel titre plausible, quelle couleur de droit cette résolution pouvait-elle donner aux défendeurs, d'aller niveler ce terrain et détruire les clôtures en la possession du plaignant, dans le but d'y établir un cimetière?

La loi du pays exige pour qu'un cimetière puisse être établi dans une paroisse, que l'autorité religieuse ou ecclésiastique concoure avec l'autorité civile. Sans le décret de l'évêque ordonnant l'établissement du cimetière, il ne peut y avoir de cimetière. Le ch. 18 des statuts Ref. du B. C. le déclare en propres termes.

Qu'avait donc à faire la paroisse après la passation de sa résolution, si elle voulait que cette résolution fût suivie d'un résultat en accord avec les vœux de l'assemblée. C'était de se retirer par devers l'Evêque et de faire les procédés nécessaires pour obtenir son assentiment à l'objet de cette résolution.

Tant que l'évêque n'aurait pas consenti à prendre ce terrain ainsi adjacent au cimetière actuel, comme moyen d'agrandissement ou d'extension de ce cimetière, cette résolution eût dû rester lettre morte.

Et les pièces au dossier démontrent que l'évêque eût été loin d'accéder aux désirs des paroissiens exprimés dans cette résolution, puisqu'il avait déjà choisi un autre terrain plus spacieux pour y établir le nouveau cimetière.

Les défendeurs ne peuvent donc prétendre que cette résolution leur a un *claim of right* ou une couleur de droit pour aller envahir la possession ou occupation du plaignant, (en supposant que cette possession soit prouvée avoir existé), et pour commencer à déblayer, niveler, déplacer ou détruire dans le but de faire de ce terrain un cimetière.

Le requérant ne peut non plus prétendre que parce que l'acte de donation de 1822, exprimait que ce terrain était donné dans le but d'en faire un cimetière, la paroisse avait le droit nonobstant le défaut d'assentiment de l'évêque, d'y établir le cimetière. L'autorité religieuse avait son mot à dire là-dessus de même qu'elle a encore son mot à dire sur la question d'agrandissement de ce cimetière.

Mais, dit-on, il était stipulé dans cet acte de donation que la propriété devrait retourner aux donateurs si on ne l'employait pas pour les fins y mentionnées. Or, comment cette considération peut-elle aller à diminuer les droits de l'ordinaire ?

Si l'évêque considère que ce terrain, d'environ 1½ arpent en superficie est aujourd'hui totalement insuffisant et impropre à la destination qui est prescrite par l'acte, il est parfaitement maître de refuser le décret demandé, quand même la conséquence de cette décision irait à opérer le retour de ce terrain ou de partie de ce terrain aux donateurs originaires. La paroisse probablement ne laissera pas s'effectuer ce retour s'il est demandé, sans se défendre, mais toujours est-il que, quand même le défaut d'emploi du reste de ce terrain en cimetière devrait en loi avoir l'effet d'en forcer le retour, les pouvoirs de l'évêque n'en seraient pas pour cela amoindris ou diminués.

Mais, dit le requérant, à part cette résolution votée dans l'assemblée du 29 mars 1885, j'avais encore un autre document, lequel pouvait me donner couleur de titre ; c'est l'autorisation qui m'a été donnée par deux marguilliers de l'œuvre, m'ordonnant d'aller défaire les clôtures et faire des travaux sur ce terrain.

Il faut remarquer que cette autorisation n'est pas donnée par le corps même de la fabrique parlant par résolution, comme doivent le faire toutes les corporations, mais contient l'ordonnance purement personnelle de ces deux marguilliers.

Or, comment cette autorisation de ces deux marguilliers pouvait-elle constituer un titre au défendeur, lui permettant d'aller préparer ce terrain pour un cimetière en conformité à la teneur de cette autorisation, si l'évêque n'a jamais approuvé le choix de ce terrain comme cimetière, il n'y a pas plus couleur de titre dans cette autorisation que dans la résolution elle-même ; et ensuite cette autorisation a encore le défaut de n'être que la permission individuelle de deux hommes ayant bien la qualité de marguilliers, mais n'ayant pas exercé leurs fonctions comme tels, lorsqu'ils ont donné cette autorisation. Il eut fallu tout au moins que les marguilliers de l'œuvre se fussent assemblés pour

délibérer sur l'affaire, sous la présidence du curé, comme le veut la loi et qu'une résolution eût été votée à cette fin.

Mais je ne sache pas que cet ordre, tel qu'il a été donné, pût constituer un titre suffisant pour troubler la possession du plaignant, en supposant que le plaignant eût, tel qu'il l'allègue, l'occupation et possession de cette clôture et du terrain sur lequel se trouvait cette clôture.

Je ne vois donc ni dans la résolution votée dans l'assemblée du 29 mars 1885, ni dans cette autorisation donnée au requérant par deux marguilliers de l'œuvre, un titre plausible pouvant arrêter l'action du magistrat et pouvant faire casser sa juridiction.

J'ajouterai que cette Cour devrait d'autant moins dans l'espèce annuler cette conviction que l'enquête a été faite de part et d'autre et la cause a été soumise, sans que les parties se soient réservées autre chose qu'une exception contre la juridiction du magistrat, dérivant du fait de la récusation ; du moins, je ne vois nulle part dans la minute des procédés du magistrat, laquelle constitue une partie du record dans la cause, que les défendeurs aient invoqué en autant de mots, le défaut de juridiction du magistrat parqu'il y avait conflit de titres ou *couleur de droit* dans l'action des défendeurs. Il n'y a point d'autre exception préliminaire produite que celle qui résulte de la récusation.

Le requérant dit encore, que dans tous les cas, c'était la fabrique qui était en possession des biens à la date de la plainte, que le curé avait consenti que la fabrique prit possession et qu'il n'a fait ensuite que chercher à reprendre la possession qu'il avait abandonnée à la fabrique.

Ces questions de possession étaient certainement des faits dont le magistrat pouvait s'enquérir. La cour sur un bref de *certiorari* n'a pas les pouvoirs d'une cour d'appel. Elle n'a pas le droit de s'enquérir des faits. Le juge en première instance a ce pouvoir et l'a exercé ; il n'y aurait qu'un appel qui pourrait avoir le résultat possible de réformer le jugement, s'il y avait eu erreur sur l'interprétation des faits.

D'ailleurs, en supposant que les paroles prononcées par le curé dans l'assemblée : "Prenez le terrain, faites en ce que vous

voudrez, mais pas un cimetière," eussent équivalu à un abandon de son occupation et possession, pour son profit, de ce terrain (ce qui était soumis à l'interprétation du magistrat) cet abandon n'aurait toujours été fait qu'à la condition qu'on n'y fit aucun travail destiné à y établir un cimetière.

Or, la résolution passée par l'assemblée et l'autorisation donnée par les deux marguilliers, ayant eu pour objet de faire de ce terrain un cimetière, le curé, comme formant partie du corps de la fabrique, n'aurait-il pas pu, même dans ce cas, à défaut surtout de résolution de la fabrique ordonnant ce travail, déposer une plainte contre ceux qui s'étaient introduits sur cette propriété dans le but avoué d'y faire des travaux destinés à en faire un cimetière; car, cette propriété quoique soumise, il est vrai, à l'administration de la fabrique, n'était toujours qu'une propriété ecclésiastique et comme telle sous le contrôle de l'évêque.

Les biens de fabrique sont réputés appartenir à la paroisse, mais ils sont tout de même biens ecclésiastiques, et sans aucun doute le contrôle de l'évêque sur ces propriétés peut aller jusqu'à empêcher l'envahissement par la paroisse de ces propriétés pour en changer la destination et spécialement pour en faire des cimetières, en dehors de toute action de l'évêque à cet égard.

Sur le tout, je suis d'avis que dans l'espèce il n'y a pas eu d'excès de juridiction de la part du magistrat non plus qu'aucune informalité grave dans la procédure du magistrat, pouvant avoir affecté la justice qu'il a rendue.

D'où je renvoie la motion demandant la cassation de la conviction, et je casse le bref de certiorari avec dépens contre le requérant.

A. N. Charland, avocat du requérant.
H. Mercier, C.R., et *C. A. Geoffrion*, C.R., conseils.

Pagnuelo, Taillon & Gouin, avocats de l'intimé.

(J. J. B.)

LONDON LETTER.

The elections to the House of Commons have, during the past four weeks, been the chief theme of talk, on account of the peculiar relations of the two great political parties toward one another, and because of the experiment just made in the extension of the franchise. The manner in which the late

ministers managed foreign affairs gave great hopes of their disgrace to their opponents, who, however, were sensible that the support of the new electorate, one way or the other, was entirely uncertain.

Soon after this reaches you, the result of the greatest political struggle of this age will be already known,—the triumph of the Liberals almost against their expectations, the appearance of Parnellism to hold the balance and dictate the course of affairs, the obstruction of all substantial legislation, and then perhaps another appeal of the Queen to her faithful people.

Much has been talked of the church, but very little that is not absurd; a great deal, too, of the land, which the common people think never belongs to the owners at any time, but always to somebody else.

The most unusual incident of the elections was the claim of a Mistress Helen Taylor to be put up as a candidate; but as she appeared before the returning officer in person, her sex was plain on the surface, and he declined to receive her name. She had then to content herself with protesting, and next day she instituted legal proceedings against the Returning Officer. If she had acted by an agent, it is supposed the Returning officer would not have been warranted in his refusal, because the Christian name is not conclusive of sex; and so the lady in question might have had an opportunity, fruitless no doubt, of urging her right at the bar of the Commons' House.

As might have been expected, from the strife of the hustings, there has arisen a crop of libel actions, one of which is by the Judge Advocate-General against a prominent member of the late government.

The indefatigable Mrs. Weldon, the queen of litigants "in person," has reached the end of her labours; of the score of actions she had in hand, some were concluded and the rest given up in open court a few days ago.

The ingenious point raised in the case of *Regina v. Ashwell*, and which had been twice argued before the full court, has now been decided, that is to say, there being fourteen judges equally divided, the conviction is upheld. Thus it is settled that if A give B a sovereign by mistake for a shilling, and B, soon afterwards, but not at the moment, discover the error, he may be convicted of larceny.

The resignation of the Lord Justice Baggallay, and the preferment of Mr. Justice Lopes into his seat, in the Court of Appeal, has created a vacancy on the Bench, which will probably not be filled before Christmas.

LINCOLN'S INN, 9th Dec., 1885.

GENERAL INDEX TO SUBJECTS.

VOL. VIII.

	PAGE		PAGE
ABDUCTION of girl under 16—Evidence...	229	ADMINISTRATOR	12
ACCESSION—Pigeons passing to another dove cot.....	234	ADOPTION by Chinese family	89
ACCOUNT—Contestation	348	ADULTERATION, milk with cream abstracted 1, 4	
See PROCEDURE.		ADVOCATES practising together—Solidarity	143
ACQUIESCENCE in judgment.....	353	AFFIDAVIT, action qui tam.....	133
ACTION against depositary of stake	331	before Commissioner of Superior Court.....	2
Against secretary-treasurer of school municipality.....	12	Capias.....	84
Of assignee under voluntary assign- ment.....	330	Capias and Saisie-arret	100
By beneficiary heir—costs.....	253	Penal action under Dominion Elec- tions Act	60
By better against agent.....	361	Saisie-arret avant jugement	71
By minor emancipated.....	134	AFFIRMATION QUESTION.....	273
By receiver of foreign company. 100, 245		AGENCY—General authority.....	331
Creditor claiming account of monies collected for insolvent debtor... 363		Principal bound by knowledge of agent.....	281
Ejectment by co-proprietor.....	342	Proof of authority to endorse cheque. 60	
En garantie.....	133	AGENT, under English Larceny Act, 1861..	379
For divorce by guardian of insane person.....	216	ALIEN, cannot be tutor.....	227
For injuries, by person insured....	63	Rights of person born in India. 339, 344	
Hypothecary — Averments of de- claration—Evidence.....	7, 76	ALIMENTARY ALLOWANCE.....	61, 91
Money lent for gaming.....	190	Person detained under capias.....	160
Money payable in foreign state....	12	ALIMENTARY DEBT, Seizure for.....	101
Quality to sue.....	100, 245	AMOVAL (The) of Mr. Justice Willis.....	318
ACTION QUI TAM—Compensation.....	330	ANDREWS, F. A., The late	224
Consolidation of causes.....	348	ANDREWS, F. W., appointment as Judge of Superior Court.....	81
Dominion Elections Act.....	331	APPEAL BOND.....	11
Insufficiency of affidavit.....	133	APPEAL BUSINESS.....	27, 369, 377
Registration of partnership after action brought.....	266	APPEAL COURT, working under pressure....	17
ACTION Réhibitoire.....	3	APPEAL from final judgment brings up inter- locutory decisions.....	274
Surety—Transfer	369	APPEAL REGISTER.....	30, 39, 102, 118, 173, 189
To set aside election as mayor....	245	315, 390
To set aside procès-verbal.....	67	APPEALS FOR COSTS.....	1
ADJUDICATAIRE. See SHERIFF'S SALE.		APPEALS, Proportion of reversals	137
ADMINISTRATION OF JUSTICE... 273, 275, 286, 291		APPEALS to Privy Council in 1884.....	81
.....	307	APPEAL to Privy Council from Supreme Court.....	393, 396
Delays in.....	105, 217	APPEAL to Supreme Court—Future Rights. 155	
		APPEAL to Supreme Court—Injunction... 410	

APPEARANCE—Service.....	134	BUILDER, Privilege of.....	354
ARBITRATION as a substitute for litigation.....	8, 402	BUILDING SOCIETY, Confiscation of shares..	196
ARMSTRONG'S Laws of Intestacy in the Dom- inion of Canada.....	401	BUSINESS FAILURES in 1884.....	40
ARREST by officer of Corporation.....	18	CAIRNS, Earl, The late.....	112, 137
ASSESSMENT, Repartition for construction of church.....	83	CANADIAN LAWYERS in New York.....	113
ASSESSMENT ROLL, Contestation of.....	151	CAPIAS—Affidavit.....	84, 266, 339
ASSESSMENT (SPECIAL), Liability for.....	39	Failure to file statement under C.C.P. 786.....	97
ASSIGNEE under voluntary assignment— Status.....	147	Right of defendant to alimentary allowance.....	160
ASSIGNMENT, Intervention by assignee.....	330	CAPITAL PUNISHMENT in Minnesota.....	137
ASSIZES, A sketch on the civil side.....	373	CARRIER—Conditions of bill of lading....	101
ATTACHÉ, The privileges of a Foreign....	296	Connecting line—Delay after tran- shipment.....	314
ATTORNEY, charge for letter.....	344	Damages for failing to deliver goods	188
Demand <i>en reddition de compte</i>	132	Transportation of goods.....	135
Discharge given by, for amount of judgment.....	246	CARTIER, G. E.—In memoriam.....	192
Payment to.....	247	CATERERS, Liability of.....	209
AUNT, Marriage with.....	1	CAUSE OF ACTION.....	78, 79
AVU, Divisibility of.....	244, 251, 378	Application for shares.....	340
AVOUÉ, Mandate.....	159	CEMETERY, Establishment of.....	411
BAILMENT—Auctioneer.....	254	CERTIORARI.....	60, 134, 160
Grain stored in elevator.....	15	Recusation of Justice of the Peace.	411
BANK—Certification of check by employee	254	CHANCERY SUIT—Missing document.....	352
BANK IN LIQUIDATION—Double liability calls	18	CHANCERY, A Prince's view of.....	240
BANKING ACT, 34 Vic. c. 5, s. 62—Informa- tion.....	305	CHARTER-PARTY—Time.....	152
BARBED WIRE FENCE.....	169, 170, 261	CHERRIER, C. S., The late.....	122
BARRISTER, Rights of English barristers in Ontario.....	105	CHEQUE, Acceptance.....	134
BELL TELEPHONE PATENT.....	33, 34	Authority to endorse.....	60
BERNHARDT, Sarah, assignment of part of revenue.....	80	CHIEF JUSTICE (A) among thieves.....	57
BET, action by better against agent.....	361	CHINESE, Act to prevent immigration of..	112
Stake deposited with a third party.	331	Adoption by.....	89
BILL OF EXCHANGE.....	90	CHURCH, Repartition for construction of..	83
BILLS OF LADING, Indorsement of, as se- curity.....	135	CIRCUIT COURT — Jurisdiction — Appeal from County Council.....	110
BISHOP, Joel P., Life of.....	153	Jurisdiction—Evocation.....	133
BOARDING HOUSE, Mistress of.....	19	Terms of.....	99
BORNAGE.....	117, 189	CIRCUITERS, The, Verses by Adolphus... 248	
Where bounds are previously estab- lished.....	226	CITY OF MONTREAL, Liability for special assessment.....	39
BOUNDARY MARKS, Removal of.....	189	License to junk stores.....	395
BOUNDARY TREATIES.....	84, 91	Petition to set aside election as Mayor.....	245
BRAMWELL, Lord, on "Drink.".....	137	Removal of snow from sidewalk... 348	
On Shylock.....	155	Responsibility for acts of policemen	266
BREAD "for sale.".....	392	Responsibility for bad condition of drains.....	226
BRIEFS, The preparation of.....	257	Tax on pool tables.....	330
		CIVIL CODE, N.Y.....	73
		CLERK—Art. 2006, C.C.....	102

CLERK, not a "servant" within meaning of by-law.....	196	Rescission for fraud—Rights of in- nocent third party.....	152
"CLÔTURE," Definition of term.....	235	Time for performance.....	361
CODE, Amendments to.....	161, 169	To build house—Liquidated Dam- ages for delay.....	261
CODIFICATION in England.....	128	Uncertain term.....	180
COINS, Gilding.....	144	CONTRAINTS PAR CORPS—Action for illegal arrest.....	348
COLERIDGE, C. J., and Society Journals....	265	CONTRIBUTORS, freedom accorded to.....	65
COLERIDGE LIBEL CASE.....	209, 224	CONVERSION, Logs cut from land.....	224
COLLIER, Sir Robert.....	344	CONVICTION.....	160
COMMERCIAL TRAVELLERS, License tax on..	18	COPYRIGHT, FOREIGN—American Assignee.	49
Privilege.....	102	COPYRIGHT OF LECTURE.....	15
COMMERCIAL CORPORATIONS, Local taxation of.....	26, 42	CORPORATION, Fine under C.C.P. 1025....	274
COMMISSIONER of Superior Court, Signa- ture of.....	2	(MUNICIPAL)—Board of Health....	254
COMMISSIONERS' COURT—Jurisdiction....	342, 402	Expropriation of land.....	156
COMMUTATION OF SENTENCES.....	185	Negligence.....	188
COMPANY, Inspection of books of.....	7	Negligence in leaving hole un- guarded.....	48
Purchase by Directors.....	228	CORPORATION OF QUEBEC, care of streets..	187
Sleeping Car Co., Liability of.....	7	See CITY OF MONTREAL.	
Subscriber before incorporation... ..	274	CORPORATION, TRADING, Inspection of books	7
(Telegraph)—Conditions.....	104	COSTS, Appeals for.....	1
See RAILWAY COMPANY.		Counsel fee at enquête.....	90
COMPENSATION—Claim not <i>claire et liquide</i> .	266	Distraction of.....	134
Double liability calls.....	18	Interest on.....	127
Action on note.....	60	Opposition.....	170
Drafts received before insolvency.	134	Privilege for.....	313, 341
CONSOLIDATION of the Statutes.....	67	COUNSEL FEES, Return of, when not earned,	289
CONSPIRACY to bribe members of Parlia- ment.....	144	COUNTERFEITING.....	144
To secrets proper y with intent to defraud—Indictment..	122	COUNTRY LAWYER on Law Reform.....	375
CONSTITUTIONAL LAW, Dominion Election Act.....	12	COUNTY COUNCIL, Appeal from decision of.	110
Jurors, 32 & 33 Vic. c. 29, s. 44....	395	COUPONS—Interest.....	273
Legislation on health matters....	337	COURT HOUSE of St. Louis.....	72
License for storage of gunpowder.	395	COURT OF APPEALS, New York.....	33
Power of local legislature to regu- late sale of liquor.....	28	COURT OF QUEEN'S BENCH, Order of business in appeal.....	27
Prohibition of things hurtful to public health.....	354	COURTS, Admission to.....	225
Provincial Tax on Commercial Cor- porations.....	42	COURTS OF APPEAL, Baron Huddleston on.	289
Tax on Exhibits.....	50, 58	CRIME, Diminution of.....	193, 201
CONSTITUTIONAL QUESTIONS in the Province of Quebec.....	249	CRIMES AT SEA.....	40
CONSUL GENERAL—Chargé d'affaires.....	253	CRIMINAL LAW, Administration of.....	97
CONTEMPT OF COURT.....	68, 72	Amendment Act, England.....	257, 264
Interference with witness.....	229	Embracery.....	114
Pointing pistol at counsel.....	281	False Pretences.....	56
CONTEMPT OF PARLIAMENT.....	56	CROSS EXAMINATION.....	73
CONTRACT, Gambling.....	8	CROWN, Privilege of.....	234, 321
		DAMAGES, Action against owner of wharf..	1
		Caused by wreck of vessel.....	117
		Delay to pay money.....	370
		Lien de droit.....	188

Malicious prosecution of civil suit	190	EVIDENCE, Admission of defendant in	
Right to particulars	226	action <i>en séparation de corps</i>	2
Runaway horse	315	In cases of personal injury	13
Singular claim for	401	In criminal cases	97
DEFAULT, Demand of payment before suit	171	In criminal matters, Act to amend	
.....	330	law of	129
DELAY, Notice of sale	82	Indictment for receiving stolen	
DEMAND OF PAYMENT before suit	171, 330	goods	13
DEMURRER, Curious example of	16	In hypothecary action	7, 76
DEPOSIT—Preliminary exception	61	Obscene pictures	64
Valise left in hotel by a person not		Of existence of partnership	161
a guest	215	Of infidels in Massachusetts	209
DE SOUZA <i>In re</i>	105, 146, 232	Of law of foreign country	73
DIVORCE, FOREIGN, effect of, in Province of		Of mailing letters	233
Quebec	42, 53	Of power to create hypothec	7
In Paris	265	Of unchaste women	121
DIVORCE LAW in France	22	Pass-book or tally	371
Refusal of conjugal duty	246	Payment of judgment	117
DOG CASE	81	Prisoners as witnesses	384
DOMICILE of homeless bachelors	382	Privileged communication	89
DONATION in marriage contract of daughter,		Proof of marriage	317
proof of insolvency of donor	5	Tender of rent	347
Substitution	7	To contradict deed	371
To married woman	348	Valuation—Phosphate mine	411
DRAFT presented after death of drawer	232	EVOCATION, taxes for construction of church	133
DUDLEY CASE	209	EXCEPTION, DECLINATORY	78, 79
DYNAMITE WARFARE	121	EXCEPTION TO THE FORM, Inscription	68
DYNAMITERS, Punishment of	57	EXCOMMUNICATION CASE in England	296
EDUCATIONAL INSTITUTION — Exemption		EXECUTION—Guardian	187
from taxes	83, 275	Joint and several condemnation	117
Exemption from special assessment	347	Seizure of ship	84
ELECTIONS ACT (Dominion) Action for		Suspension of	69, 70
penalty—Affidavit	331	Tavern license	133
Affidavit for penal action	378	EXECUTOR, Account	61
Civil remedy for breach of	12	Cannot pay charitable donation	
Corrupt practice—Wager	228	promised by testator	305
ELECTIONS ACT, QUEBEC—Duties of Mayor		Powers of	10
and Secretary—Penalty	132	Sale by	281
List of Voters	226	EXEMPTION FROM TAXES	83, 275, 347
ELECTORAL FRANCHISE, Act concerning	130	EXHIBITS, costs of	347
ELECTORAL LIST, Failure of Secretary-Treasurer to transmit	245	Provincial Tax on	50, 58
ELECTOR'S POLITICAL CATECHISM	192	EXPERTS, Report of—Amendment	226
ELEVATORS in Courthouses	25	Testimony, as to obscene pictures	64
ELOQUENCE at the bar	34	EXPROPRIATION of land by municipal corporation	156
EMBRACERY	114	Of land for railway	100
ENCLAVE	118	Riparian proprietor	354
ENCLOSED LAND, 540 C.C.	226	Valuation of property— <i>mandamus</i>	341
ENQUÊTE, revision of rulings	28	EXTRADITION TREATY, Extension of	185
KEHR, Lord	320	Fraudulent misappropriation of securities	379
		Revision of	9

FABRIQUE, Authorization to sue.....	244	HUSBAND AND WIFE—Action of wife for account—Authorization.....	42, 53
FACTUMS—In Appeals from interlocutory judgments.....	329	Admission of consort in action <i>en réparation de corps</i>	2
FAILURES in 1884.....	40	Effect of foreign divorce.....	42, 53
FAITS ET ARTICLES, Mode of taking answers.....	250	Necessaries for family.....	246
FALSE PRETENCES, Obtaining goods by....	13	See MARRIED WOMAN.	
Warranty in deed.....	124	HYPOTHEC, Radiation of.—Judgment against insolvent.....	219
FALSIFICATION OF ACCOUNTS.....	20	HYPOTHECARY ACTION—Averments of declaration—Evidence....	7, 76
FAMILY COUNCIL.....	2	Claim for improvements.....	100
FEDERAL AND LOCAL JURISDICTION.....		Misdescription....	252
See CONSTITUTIONAL LAW.		Tiers détenteur.....	371
FEEB, Large.....	159	IMMOVEABLE by destination.....	118
FIRE ESCAPES.....	8	INDECENT EXPOSURE.....	13
FISHERY TREATIES.....	84, 91	INDICTMENT—Conspiracy to secrete property.....	122
FLYNN, J. F., Appointed Solicitor-General	168	Trustee fraudulently converting property.....	123
FOREIGN COUNTRY, Proving the law of....	73	INOCULATION prohibited.....	329
FRAUD, Allegation of.....	352	INSANITY as a ground of divorce.....	313
Rescission of sale for fraud.....	152	Proof to establish defence.....	88
FRENCH PASS, Injury to person travelling on	89	The tests of.....	254
GAMING CONTRACTS, Fictitious operations.....	8, 62, 200	INSCRIPTION.....	186, 198
GAMING, Money lent for purpose of.....	190	For enquête.....	201
GEORGE ELIOT on Coleridge.....	104	On exception to the form....	68
On enfranchisement of women....	81	INSOLVENCY LAWS, Fallacy of.....	192
GIFFARD, SIR HARDINGE.....	224	INSOLVENCY, Act concerning.....	130
GORDON'S, (Gen.) Bank-notes.....	81	INSOLVENCY LEGISLATION.....	9
GUARANTEE COMPANY, Rights of.....	5	INSOLVENT ACT OF 1875—Official Assignee continued as creditor's assignee.	275
HABEAS CORPUS—Illegal imprisonment ..	189	INSURANCE (ACCIDENT) Master and servant	246
Security for costs.....	102	INSURANCE (FIRE) Concealment of facts by insured.....	340
HABITUAL DRUNKARDS' RETREATS in England	297	Damage by removal of goods....	12
HANDWRITING as an unchanging characteristic.....	249	Default to pay premium.....	62
HEALTH, Power to make regulations....	337, 353	Exaggeration of value.....	159
Regulations of Central Board.....	365	Goods left with auctioneer.....	254
HORHOUSE, SIR ARTHUR.....	344	Material concealment.....	377
HOLT, on Canadian Railway Law.....	361	Meaning of "Unoccupied".....	8
HORSE, Keep of.....	157	Misdescription—Proof of Loss....	254
HOTEL, Provisions furnished to.....	160	Premium payable at office of Company.....	246
HOTEL-KEEPER—Guest's clothing stolen—Set-off.....	369	Prescription of action.....	381
Guest taking room for purposes of prostitution.....	198	Representation—Incumbrance....	261
Responsibility of.....	200, 345	Subrogation....	128
Valise left by traveller who is not a guest.....	215	Watchman on premises.....	296
HOUGHTON, LORD.....	384	INSURANCE (GUARANTEE).....	103
HUNTING DOGS entering upon enclosed grounds.....	290		

INSURANCE (Life)—Are bonuses "profits?"	360	JUSTICES OF THE PEACE, Jurisdiction of....	60
INSURANCE (Mutual)—Transfer of thing insured.....	83	Recusation.....	411
INSURING a mother-in-law.....	272	KING (A) in the witness-box.....	96
INTERDICTION, Children of petitioner.....	235	LAND TRANSFER in England.....	353
Deception by person to whom judicial counsel has been named...	247	LARCENY, Description of owner of stolen property.....	14
INTEREST—Failure to pay money.....	370	Peculiar cases of.....	225
INTEREST ON COSTS.....	127	Receiving sovereign for shilling.....	105, 122, 177, 409
INTEREST ON INTEREST.....	4	LAUDERDALE PEERAGE CASE.....	193, 241
INTERNATIONAL LAW (Private).....	12	LAW REFORM, Mr. Justice Stephen on....	33
INTERNATIONAL QUESTION, AN.....	169	LAW REPORTING, Lord Justice Lindley on	151
INTERVENTION.....	151	LAWYER AND CLIENT, Dialogue between..	272
By wife <i>séparés de biens</i>	100	LAWYERS in the new English Administration.....	263
JOURNALISM in Ancient Rome.....	40	In Politics.....	377
JUDGE AND ADVOCATE—The duty of the Judge—Lord Bacon's opinion	41	In the Imperial Parliament.....	409
JUDGE—Excess of jurisdiction.....	385	Of limited vision.....	49
Letter commenting on trial	392	Letters of.....	171
Protesting against system of recusation.....	113	Libraries.....	191
JUDGES as law reporters.....	16	Making a Pilgrimage.....	304
Election of.....	145	LAWYER, The first in Boston.....	296
JUDGMENT, Final.....	60	LEASE of steam-power—Sub-lease	396
JUDGMENT OF DISTRIBUTION, Contestation of	227	Rights of sub-tenant	3
JUDGMENT, Statement of <i>Considérents</i>	373	Successive transfers.....	159
JUDGMENTS, CRITICISM OF.....	114, 377	LEGACY.....	101
JUDICIAL APPOINTMENTS in England.....	231	Sale of object bequeathed.....	178
Delay in making.....	9	Verbal.....	118
JUDICIAL CENSURE of Attorney's conduct of case.....	24	LEGAL EXAMINATIONS, Quebec.....	257
JUDICIAL SALARIES.....	329	PROCEDURE, Reciprocal, between Mother country and colonies...	128
JUDICIAL SALARIES in the U. S.....	114	PROFESSION, Judge Holmes on.....	177
JUDICIAL VETERANS.....	393, 401	LEGISLATION, "R" on.....	129
JURIES, Treatment of, in England.....	338	LESSOR AND LESSEE—Damages suffered by Tenant.....	332
JURISDICTION—Cause of action.....	78, 79	Ejectment by co-proprietor.....	342
Change of domicile by defendant..	63	Repairs.....	90
Order given in another district....	385	Responsibility of lessor for acts of tenant.....	75
Ship at wharf.....	169	Responsibility of tenant for fire... 119	
Superior Court—Retraxit.....	341	Responsibility for fire.....	173
Wages.....	7	Responsibility of principal tenant. 172	
See CONSTITUTIONAL LAW		Rights of lessor as to lessee's effects 68	
"JURIST," Unauthorized publication of... 9		LETTER—Mailing—Presumption.....	104
JURORS, Affidavits of.....	281	LIBEL by corporation.....	104
Tampering with.....	73	By post card.....	118
JURY, Discharge of, before verdict.... 305, 307		Criminal prosecution — Guilty knowledge—Privilege.....	98
JURY LAW, Province of Quebec.....	395		
JURY, Unduly influencing.....	145		
JUSTICE in the Isle of Man.....	81		

Damages—Verdict	377	MINOR, Conviction against.....	160
Preliminary examination—witnesses produced by accused.....	259	Emancipated by marriage, action by	134
Publication	262	MITOYEN WALL.....	11, 62
Suits against newspapers.....	112	MONTREAL LAW REPORTS.....	9, 66, 113, 394, 409
The law of.....	105	MUNICIPAL CODE, Art. 19.....	233
Trial of newspaper proprietor	305	MUNICIPAL CORPORATION, Power to license and regulate.....	395
LICENSE ACT, Quebec—Competent tribunal.	196	See CORPORATION.	
.....	362	MUNICIPAL ELECTION, Delay for contesta- tion.....	99
LIEN on horse for board.....	340	Qualification of Alderman.....	186
LICENSE TAX on Commercial travellers...	18	MUNICIPAL ELECTION CASE—Review.....	332
LIQUOR LICENSE ACT, 1883.....	17, 26, 379, 409	MUNICIPAL INSTITUTIONS.....	354
LITIGANT "IN PERSON" in England.....	41	MUNICIPAL LAW—Road—Procès-verbal...	253
LOPES, Lord Justice.....	409	MUNICIPAL MEETING, Disturbance of	189
LOBANGER, Hon. T. J.J., The late.....	295	MUNICIPALITY—Division—Taxes	61
		Local.....	233
MCGIBBON on abandonment of property and assignments.....	201	MURDER, suggested by novel reading.....	104
MAGISTERIAL WISDOM	16	MUR MITOYEN.....	11, 62
MAJORITY of Prince Albert of Wales....	32		
MALICIOUS PROSECUTION OF CIVIL SUIT— Damages.....	190	NATURAL CHILD—Status.....	349
Probable cause.....	266	NATURALIZATION in Canada.....	245
MANDAMUS against arbitrators.....	341	NAVIGATION of the St. Lawrence.....	131
Order of Judge in Chambers made in another district.....	195	NEGLECT, Corporation leaving hole un- guarded.....	48
MANDATARY. See PRINCIPAL AND AGENT.		Furnishing unwholesome food....	209
MANDATE—Partial execution of.....	116	NEW TRIAL, Libel case.....	377
See PRINCIPAL AND AGENT.		Ordered upon Reserved case.....	151
MARCHANDE PUBLIQUE.....	19	NORTH-WEST TERRITORIES, Criminal Proce- dure.....	337
MARINE ZONE	242	NOTARIES, signing as witnesses, proof of signatures.....	76
MARRIAGE CONTRACT, Construction.....	68	NOTARY, Responsibility.....	266
MARRIAGES, MIXED.....	320	NOTICE OF ACTION against public officer...	245
MARRIAGE IN NORTH-WEST TERRITORY....	178	NUISANCE.....	192
MARRIAGE WITH AUNT.....	1		
MARRIED WOMAN, Authorization to sue....	187	OATH QUESTION.....	49, 193
Donation to.....	348	OBSCENE PUBLICATIONS.....	249, 297
Insurance.....	331	ONTARIO LAW REPORTS	225
Responsibility.....	188	OWNERSHIP—Buildings on land.....	247
Rights of, in England.....	20		
Séparée and marchande publique. Action by	134	PARLIAMENT, Female candidate for.....	418
See HUSBAND AND WIFE.		PARTIES TO ACTION.....	196
MASTER AND SERVANT, goods obtained on credit.....	391	PARTNERSHIP—Dissolution	330
Insurance against accidents.....	246	Dissolution—Account	118
Responsibility of employer.....	152, 233	Division of common property....	163
See PRINCIPAL AND AGENT.		Illegal conversion of partnership funds.....	132
MATTINGS in streets.....	161	Rescission of contract.....	340
MILK, what is.....	1, 4		

Responsibility of partners.....	347	Responsibility of agent.....	267
Sale of Goodwill.....	14	Stock held "in trust".....	403
Seizure by garnishment of one partner's share in the hands of firm.	267	PRIVILEGE.....	102
PATENT ACT OF 1872 -- Combination of known elements—Importation..	34	Contractor for construction of Railway.....	99
Forfeiture for non-manufacturing—Importation after twelve months.	202	Costs of <i>Saisie-Gagerie</i>	158
.....	210, 220	For costs.....	313, 311
Tribunal for settlement of disputes	33	For hearing.....	362
PATENT OF INVENTION—Delivery of model.	136	In relation to criminal issues.....	125
Jurisdiction of Minister of Agriculture—Procedure.....	262	Of <i>bailleur de fonds</i>	189
PATERNITY AND LIKENESS.....	346	Of builder.....	354
PENAL ACTION—Dominion Election Act—Affidavit.....	60	Of the Crown.....	234, 321
PENAL LAWS, Lord Bacon on.....	257	Provisions furnished to hotel-keeper	160
PERJURY, Evidence.....	151	PRIVILEGED COMMUNICATIONS.....	89
Irregular deposition.....	250	PROBABLE CAUSE, arrest by officer of corporation.....	18
Materiality of facts sworn to.....	151	PROCEDURE—Affidavit for <i>capias</i> and <i>saisie-arrest</i>	100
PEW—Rights of Lessee.....	117	Affidavit for <i>saisie-arrest</i> <i>avant jugement</i>	71
PHARMACY ACT—Illegal Partnership.....	378	Alias writ of summons—Stamp..	330
PHEASANTS as a nuisance.....	192	Amendment of declaration... ..	341
PHYSICIAN, assuming to be.....	342	Amendment of writ of summons..	101
Extent of privilege.	90, 222	Amendment of plea.....	402
Privilege.....	224	Appearance—Service.....	134
Negligent treatment of patient....	104	Consolidation of actions <i>qui tam</i> ..	348
Practising without a license.....	342	Contestation of account.....	348
Responsibility of, in performing vaccination.....	329	Contestation of election of School Commissioners.....	274
PICTURE, change of artist's signature.....	64	Contestation of judgment of distribution.....	227
PIGEONS going to a neighbour's dovecot...	234	Contestation of opposition.....	252
PILOTAGE, compulsory.....	7	Contestation of return of service.	189
PLEADING, absence of authorization of married woman.....	187	Costs of exhibits.....	347
Action for illegal arrest.....	348	Declaration of garnishee.....	396
Demurrer to demurrer.....	348	Dismissal of action on motion....	371
Litispence and compensation..	347	Execution.....	69, 70
Right to plead on amendment... ..	348	Execution—alias writ.	394
PLEDGE, Rights of owner.....	172	<i>Faits et articles</i>	250
Tradition.....	48	Foreclosure.....	378
POOL TABLE taxable as billiard table....	330	Guardian.....	187
POSSESSION of materials delivered for construction of railway.....	32	Guardian to <i>saisie revendication</i>	99
PRELIMINARY EXCEPTION—deposit.....	61	Incidental demand.....	267
PRESCRIPTION.....	151	Inscription.....	110, 186, 198
Interruption of.....	246	Inscription for enquête.....	201
Under 2262 C.C.....	157, 190	Inscription on exception to the form.....	68
PRINCE'S MAJORITY.....	32	Leave to re-plead.....	101
PRINCIPAL AND AGENT, continuation of relationship.....	12	Mandamus against arbitrators....	341
		Motion to dismiss action.....	322
		Motion to reject allegation of declaration.....	2

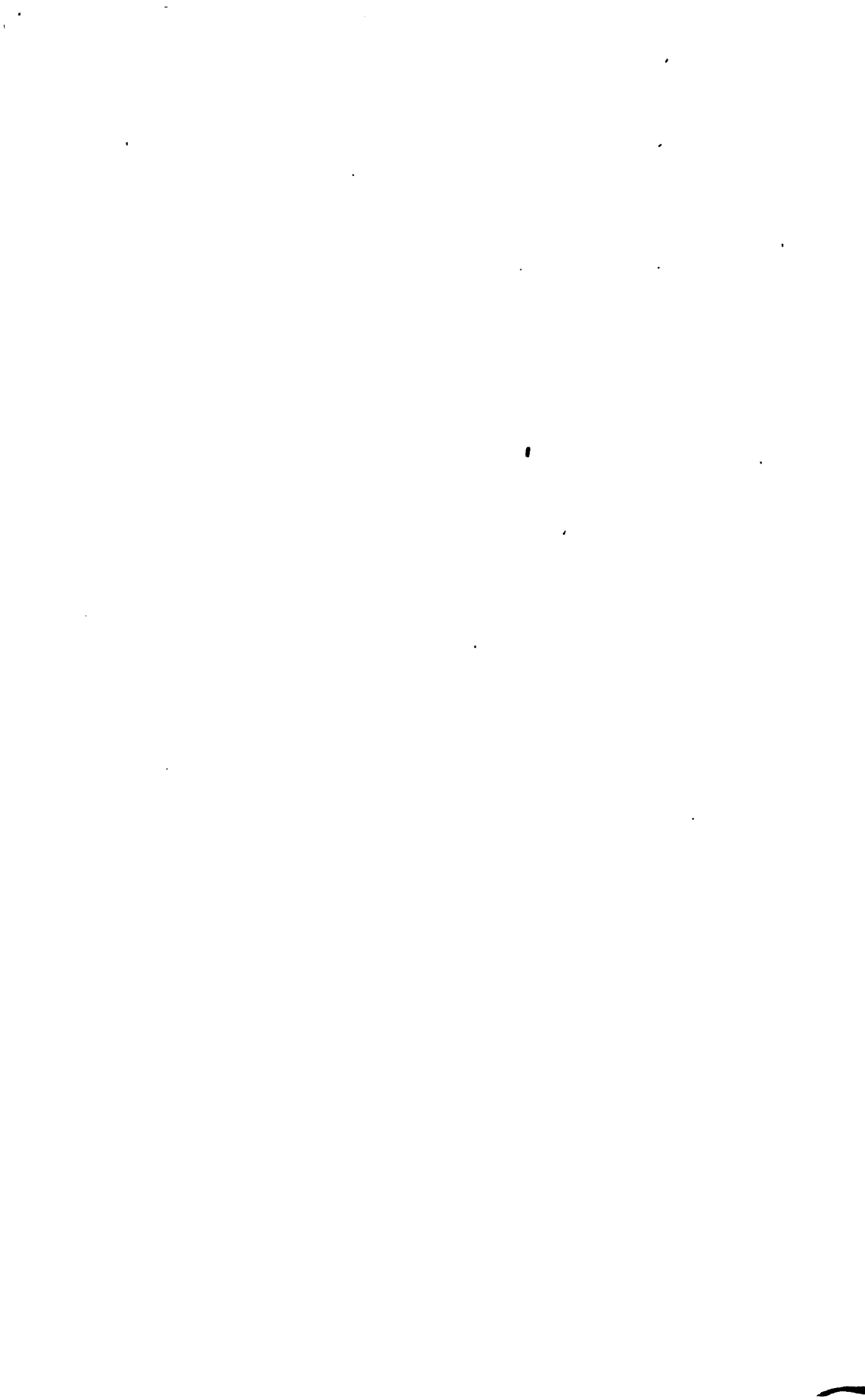
Notice of judgment.....	402
Notice of sale.....	82
Opposant bound to give security..	225
Preliminary exception.....	252
<i>Saisie arrêt</i> simple.....	188
Security for costs.....	341, 378
Seizure—Advertisement.....	253
Sheriff's sale—Subdivision of lot..	341
Summons — affidavit — exhibits— <i>faits et articles</i>	189
Taxation of costs.....	402
Tierce opposition.....	227
PROOFS—VERBAL, action to set aside.....	67
PROHIBITION AND CRIME.....	25
PROHIBITION—Magistrate.....	305
PROMISE to contribute to charity.....	305
PROMISSORY NOTE.....	90
Consideration	84
Dilatory exception.....	378
Transfer.....	245
Transfer of note not stamped.....	133
PROPRIETOR—Rights of—Exclusion of hunt- ing dogs.....	290
PROTEST, Costs of.....	157
PUBLIC OFFICER, notice of action.....	245
PUNISHMENT—"Cruel and unusual".....	232
QUALITY—Condemnation to costs	253
To sue.....	100, 245
QUEBEC LICENSE Act—Notice to tavern- keeper.....	101
QUEEN'S COUNSEL.....	359
Appointment of.....	186
QUO WARRANTO.....	274
RAILWAY ACT of Dominion does not abro- gate local railway act.....	82
RAILWAY—Barbed Wire Fence.....	261
RAILWAY COMPANY—Conditions of bill of lading	101, 348
Condition exempting it from res- ponsibility	118
Combustible materials allowed to accumulate	304
Damage caused by sparks.....	227, 275
Damage to freight.....	62
Expropriation of lands for railway	100
Facilities to Express company....	228
Injury received on track.....	274
Obligation to fence.....	322, 332

Petitory, action against.....	252
Property in materials delivered for construction....	32
Responsibility to persons travelling on passes.....	89
Responsibility for dog lost.....	111
Responsibility—Injury to passenger	341
Responsibility where service is gra- tuitous.....	216
Transportation of Goods.....	135
Connecting line—delay after tran- shipment.....	314
Contractor's lien.....	99
RAILWAY ROLLING STOCK.....	16
RECORDER'S COURT, Montreal— <i>Certiorari</i> ..	134
Montreal, Jurisdiction of.....	158
Quebec, Jurisdiction of.....	131
RECUSATION of magistrate.....	305
Justices of the Peace.....	411
RAMSAY, Mr. Justice, Charge as to the law of libel.....	105
On law of evidence in criminal cases.....	97
On tampering with jurors.....	74
RAMSAY, R. A., on the treaties affecting the boundaries and fisheries of Canada.....	84, 91
RAPE, Consent given by error.....	29
Personation of Husband	265
REFORMS, Suggested.....	369, 375
REGISTRATION—Customary dower.....	331
REGISTRAR, Tariff.....	187, 340
REGISTRATION.....	186
Omission of cadastral number....	252
RENTE CONSTITUÉE—Tiers détenteur....	371
RÉPÉTITION.....	188
RESERVED CASE, Amendment.....	395
RESPONSIBILITY, Accident caused by run- away horse.....	63
Of employers.....	66
Of owner of animal.....	315
Unhealthy establishment.....	191
REVIEW, Final Judgment.....	60
Judgment on contestation of muni- cipal election.....	332
REVISING OFFICERS.....	360
RIEL, LOUIS, The case of.....	241
Opinion by D. Macmaster, Q.C....	335
Case before the Privy Council....	355
Memorandum of Minister of Jus- tice.....	397, 403

RITCHIE, Mr. Justice, J. N.....	313	SEPARATION DE CORPS, Admission of consort	2
ROAD, Procès-verbal	253	Custody of children	91
RULINGS AT ENQUÊTE, Revision of.....	28	SERVICE of writ in Courthouse.....	12
SAISIE-ARRÊT, before judgment	38	SERVITUDE	118
Garnishee contesting.....	372	Destination by proprietor.....	355
Illegal removal of effects attached	7	Of passage—Aggravation.....	354
Partnership.....	267	River frontage.....	354
Right of seizing creditor.....	364	Use and extent	355
SAISIE-GAGERIE, Rights of sub-tenant.....	3	Water-course	7, 253
SAISIE-REVENDICATION	197	Water-course—Procès-verbal.	67
Description of effects seized.....	227	SHERIFF'S SALE, Description of immovable	402
Powers of guardian.....	99	Rights of purchaser.....	297
SALE A RÉMÉRÉ.....	117	Tariff.....	341
Delay.....	267	Subdivision of lot.....	341
SALE by executors.....	281	SHIP, Action of captain for demurrage....	188
By minor—Ratification.....	307	Action by part owner	196
By <i>prête-nom</i>	197	Charter party	394
By sample.....	228	Charter-party—Rejection of contract.....	152
Evidence.....	371	Collision.....	56
Judicial—Right of third party		Necessaries.....	56
against purchaser.....	330	Seizure of.....	84
Latent defects.....	3	SHORTHAND, Disadvantages of.....	369
Misrepresentation.....	410	SIDEWALK, Public, Removal of snow from.	8
Or Bailment.....	15	SIGNING a note or deed	175
Of real rights.....	188	SIMULATED DEED.....	67
Refusal of purchaser to accept....	377	SLANDER—Justification—Mitigation of	
Resiliation	101	damages.....	262
Term—Compensation.....	331	SLEEPING CAR COMPANY, Liability of.....	7
Verbal acceptance.....	385	SMALL POX EPIDEMIC and the Legal Profes-	
Term.....	340	sion.....	369
Without delivery.....	140	SMALL POX LAW.....	329
SALVATION ARMY—Assault case.....	352	SOLICITOR retaining money.....	345
SCHOOL COMMISSIONERS—Assessment rolls.	252	SPECIAL SESSIONS, Court of.....	196
Contestation of election.....	274	SPIRITUAL MEDIUMS.....	66
SECRET OF SUCCESS, The.....	145	STANDARD TIME.....	119
SECRETARY-TREASURER, failure to transmit		STATUS, Natural child.....	349
electoral list.....	245	STENOGRAPHER'S FEES.....	197
SECURITY FOR COSTS—Opposant bound to		STOCKS, Speculative, sale or purchase of..	8
give.....	225	STREET, PUBLIC—Obstruction of.....	197
Plaintiff leaving Province while		STUART, Mr. Justice, appointed Chief	
suit pending.....	378	Justice S.C.....	81
<i>Prête-nom</i> of non-resident plaintiff	341	SUBPOENA to produce horse.....	320
Where plaintiff leaves Province		SUBSTITUTION, Intervention by substitute	281
after suit commenced.....	402	Powers of curator—Interest.....	410
In appeal, condemnation under C.		Resiliation of donation creating..	7
C.P. 1025	11	Sale of substituted property.....	2
SEDUCTION—Damages.....	260	SUCCESSION, Acceptance of, by married	
SEIGNIORY, Commutation	197	woman.....	246
SEPARATION as to property obtained in		Debt of.....	134
France.....	100	Of natural child.....	91

<i>Rapport</i>	63	TRIAL, An Early Criminal.....	236
Vacant—Legatees.....	332	Preparing for	272
SUIT, A PROTRACTED.....	25	Reconsideration of case by Jury..	186
SUMMONS, service of, in Courthouse.....	12	TROUBLE—Security.....	152
SUNDAY TRAVEL.....	145	TROUILLEBERT—Tedesco affair.....	64
SUPERINTENDENT OF EDUCATION—Jurisdiction of.....	11	TRUSTEE fraudulently converting property	123
SUPERIOR COURT—Jurisdiction—Retraxit..	341	Removal of.....	12
SUPREME COURT OF CANADA, Bill to restrict jurisdiction of.....	49, 65	TUTOR, alien cannot be appointed.....	227
Time for appealing.....	227	TUTORSHIP.....	134, 307
SUPREME COURT, U.S.....	184	“UNMARRIED,” meaning of word.....	217
SURETY—Action against principal debtor.	266	UNIVERSITY MEN in office.....	233
Fol enchérisseur.....	83	VACATION	201
Rights of company insuring against loss by misconduct of employee.	5	Period of.....	216
Woman as judicial surety.....	226	VACCINATION LAWS, Resistance to	321
TAMPERING WITH JURORS.....	73	VAGRANT ACT, 32 & 33 Vic. c. 28.....	261
TARIFF OF FEES.....	170	VALUATION OF PROPERTY.....	341
TAVERN LICENSE, not seizable.....	133	VENDOR, (Unpaid), Privilege of	244
TAXATION, Direct and Indirect.....	50, 58	WAGES—Jurisdiction	7
TAXES—Exemption of Educational Institutions.....	83, 275	WAITE, Chief Justice, in England.....	376, 393
TENTH, A levy on.....	289	WALL, Sign of <i>mitoyenneté</i>	11
TELEPHONE COMPANIES—Responsibility of.	72	WATER-COURSE, Diversion of.....	7
TENDER made with special answer.....	226	WHARF-OWNERS, Responsibility of.....	1
THEATRE, Expression of disapprobation in	353	WIFE separated as to property, transferring note as security for husband's debt	101
THOMPSON, Hon. Mr., Appointment as Minister of Justice.....	313	<i>See</i> HUSBAND AND WIFE; MARRIED WOMAN.	
TOLLS, Rate of.....	233	WILL.....	173, 177
TRADE MARKS.....	239	Authentic, not dictated.....	235
TRADING under name of wife.....	240	Exercise of power to divide.....	265, 267
TRANSFER, calling in transferee.....	134	Interpretation of word “ <i>mobilier</i> .”	172
Of claim not yet due.....	133	Of a French Physician.....	265
Of moveable property by way of security.....	140	(OLOGRAPH) error of date	224
<i>Saisie-arrest</i> served subsequently...	172	Signature.....	128
TREATIES affecting the boundaries and fisheries of Canada.....	84	WOMAN as surety.....	226
TREE severed from land by wind.....	104	WOMEN, Concealment of age... ..	25
		WRIT (A) OF <i>ELIGIT</i>	318
		WRIT OF SUMMONS, Amendment of.....	101
		YATES, EDMUND, Treatment of, in prison..	24





Stanford Law Library



3 6105 061 814 732

